CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

WESTERN DISTRICT, AUGUST TERM, 1822.

West'n District, *August*, 1822.

HILL vs. MARTIN.

HILL vs. *MARTIN.*

The endorsee of a promissory note, or bill of exchange, cannot write over a blank endorsement an obligation, which will discharge him from the necessity of due diligence in making demand and giving notice.

It is not sufficient to excuse want of notice, —that the endorser was not injured by the neglect.

The endorsee who receives a note after it is due, is obliged to demand payment, and give notice within the

APLEAL from the court of the fifth district.

PORTER, J. delivered the opinion of the court. The plaintiff avers, that the defendant executed an obligation in his favour for $400, and transferred to him, by endorsement, two promissory notes of one John Woods for $200 each. The petition neither states a demand on Woods, his refusal to pay, or notice to the appellant; but, on the allegations just stated, prays judgment.

The answer, besides a general denial, contained the following pleas:—

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That if the money had not been received from Woods, it was through the fault of the plaintiff.

That the notes were transferred as cash.

same delay, as if the paper was negotiable.

And that the negro slave received, in consideration of them, was afflicted with redhibitory defects.

There was judgment for the plaintiff, and the defendant appealed.

The last ground of defence set up in the answer, was abandoned in argument; and it has been admitted, that the plaintiff is entitled to judgment on account of the obligation executed by the defendant.

From the statement of facts it appears, that one of the notes, made by Woods, was transpired six months after it became due, and that the term of payment of the other had not expired.

At the trial the plaintiff wrote over the endorsement, which was in blank, as follows:— "I will pay to Samuel Hill the amount of this note, if not paid when demanded by him, to whom I assign this note."

It was proved by the testimony of Mills, that the plaintiff left in his possession the two notes drawn by Woods, whom he notified of

the transfer, and that he should shortly call on him for the amount. That some time after, about the 22d or 23d of December, 1820, he demanded payment, which was refused; and that in the month of April, 1821, he notified the defendant of this demand and refusal. The notes had been transferred in June, 1820.

On these facts the plaintiff contends, the judgment of the court below should be confirmed. Because,

1. The endorsement on the back of the note shows a special obligation, which makes the appellant responsible.

2. There was not any laches either in making demand of payment, or in giving notice.

3. If there was, he has shown the defendant was not injured by it.

I. Conceding that the obligation, inserted over the name of the plaintiff, takes the case out of the general rule, and increases the responsibility which would have resulted from an endorsement in the common mode, it becomes necessary to ascertain if the appellee had a right to make it.

To show that he was authorized to do so, he has cited a decision given in one of our

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sister states, where it was held, that on an assignment in blank, of paper not negotiable, it was lawful for the assignee to write over it an unconditional obligation in his favour for the amount specified in the instrument. 3 *Massachusetts Rep.* 274.

We are unable to gather from the report the principle on which this decision was made; and, at all events, we cannot consent to apply such a rule to the case now before us. Bills of exchange and promissory notes are governed by laws peculiar to themselves, which have grown out of the usages and customs of commercial nations. The negotiability of these instruments is highly conducive to the ease and increase of trade; and as the principles by which they are now regulated, eminently promote that end, it is of importance they should be strictly pursued. The endorser of an accepted bill of exchange, or promissory note, enters into a conditional contract that if the acceptor, or maker, does not comply with his obligation at the time promised by him, he will, on being duly notified according to law, discharge it—*Chitty on Bills* (*edit.* 1809) 312. This endorsement may be made in blank, and it is the most

usual mode. Admitting that the mere writing the name of the payee on the back, does not transfer his interest and property in the bill, (though the contrary has been decided in this court—4 *Martin*, 662, 9 *id.* 469)—that, by the law merchant, something more is necessary to make it complete, and may be inserted by the person into whose hands it shall come; that right to complete the endorsement cannot be construed to confer a power different from what the parties contemplated. It is an universal principle, that contracts must be presumed to be entered into with relation to the laws that govern them, in reference to their subject matters; and that they should be so construed, by courts of justice, as to carry into effect the views and intentions of the parties. *Chitty on Bills*, (*edit.* 1809) 77—*Civ. Code*, 270, *arts.* 56, 63.

Until the contrary is shown, we are bound, therefore, to presume, that the endorsement, in this case, was made in reference to the *lex mercatoria*, which authorizes the holder to fill up the endorsement by making it payable to himself—*Chitty on Bills*, (*edit.* 1809) 103. We can find no case, except that cited by counsel, which declares that the endorsement may be

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written out in such a manner, as to discharge the endorsee from the necessity of due diligence; and it would destroy all confidence in commercial transactions of this kind, if such a doctrine received our sanction.

II. and III. The plaintiffs read from *Chitty*, 151. to show that, when the endorser was not injured by want of notice, the laches to give it was cured. This rule is stated in a note to the edition of 1809, but it is not law. It is true, the drawer of a bill of exchange, who has no effects in the hands of the drawee, has not a right to require notice in case acceptance is refused. This, however, is an exception to the general principle, and it has been doubted if it should not be given even in such a case on non-payment. Be that as it may, it is very clear that the endorser of a promissory note is entitled to strict notice; it was so held by the supreme court of the United States, after a very full examination of all those cases which, at one time, seemed to have a tendency to introduce the doctrine, that, if the party was not prejudiced by want of notice, he could not require it. 4 *Cranch* 154,—2 *Phillips' Ev.* 37—3 *John. Ca.* 7.

In the case before us, the note negotiated in

June, which fell due on the 15th December following, was not demanded in payment until the 22d or 23d of that month, and the endorser was not notified before the month of April then ensuing. This, in our opinion, is not sufficient; the condition on which the endorser becomes liable is, that payment should be demanded in a reasonable time, and notice given of the refusal without delay. 11 *Martin*, 452.

As it respects the note, which was endorsed after it became due, we have come to the same conclusion. The transfer necessarily implied, that the plaintiff undertook to demand payment; and, if that payment was refused, to give notice to the defendant. That demand and notice must be within the period already fixed by law. If we were to relax the rule in this case, we must do it in others; and thus introduce uncertainty and confusion in a subject where it is highly advantageous to the public there should be neither. The act of endorsing a bill is similar to that of drawing—*Chitty on Bills*, 117; and the obligation thus created, the same. It is said in a late work of great authority on the subjects of which it treats, "that a note, when it has been endorsed

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and transferred, is exactly similar to a bill of exchange; it is an order by the endorser on the maker to pay the endorsee, which is the very definition of a bill: the endorser is the drawer, the maker of the note the acceptor, and the endorsee the person to whom it is made payable"—2 *Phillips' Evidence*, 10, 17. The supreme courts of Connecticut, New York, and the United States, have all recognised this analogy—2 *Conn.* 419—9 *Johnson* 121—4 *Cranch*, 154. If the bill thus endorsed is due, it is equivalent to drawing at sight. The length of time that the funds are in the drawer's hands, (whether established by a note, of which the term of payment is expired, or by other evidence,) cannot affect the obligation which the endorsee contracts to give notice in case he is not paid.

Where a note was passed five years after it became due, it was held, that notice must be given as in an ordinary case; that the law merchant made no distinction; that it was equivalent to drawing a new bill—9 *Johnson*, 121; and so it has been decided in a similar case, 2 *Conn.* 419.

We think that there was such laches in the plaintiff holding this bill, from June to

the month of April following, as have discharged the defendant from the responsibility created by his endorsement.

If we were to consider the transaction as one not commercial, the plaintiff's claim would be still less supported; it would then be governed by that article in the code which provides, that he who sells and transfers a debt, warrants its existence, but does not guarantee the solvency of the debtor. *Civil Code*, 368, *art.* 126.

It is therefore ordered adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the plaintiff do recover of the defendant the sum of four hundred dollars, with interest at ten per cent. from the 26th June, 1820, until paid, with costs in the district court, and that the appellee pay the costs in this.

Brent for the plaintiff, *Baker* for the defendant.

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APPEAL from the court of the fifth district.

A. having discovered that B. had sold him land, to which

This was an action for the rescission of a

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sale of a tract of land, on the ground that the vendor had sold the thing of another; that the sale was fraudulent; and that the land was dotal.

The defendant pleaded the general issue—that the plaintiff Bonin, immediately after the sale, took possession of the land sold, and still retains it, without ever having been disturbed: and he tendered security for any damages resulting from a legal eviction.

There was judgment for the defendant, and the plaintiff appealed.

The facts of the case are, that in March, 1820, the defendant sold to the plaintiff, Bonin, a tract of land of $14\frac{2}{3}$ arpens, in front on the Teche. In December, following, the plaintiffs having discovered, that they had purchased what did not belong to the vendor, gave public notice of their intention to procure the rescission of the sale, and the restitution of the notes given by Bonin, for the price, endorsed by the other plaintiff.

A few days after, a family meeting, composed of the friends of the minors Dumartrais, was called; and was of opinion, that a tract of land, mentioned in its proceedings, could not be conveniently divided, and that it therefore

he had no title, gave notice, he would not pay the price, and require a rescission. Before service of the citation on B., a family meeting, being of opinion that the land could not conveniently be divided, recommended the sale of it. At the auction which followed, B. purchased the land.

Held that, although it did not appear, that the heirs of age had provoked a division or a sale, B. was equally protected, as if the sale had been forced on the minors: the tutor having been a party to the proceedings, and that the sale was legal; and B. having acquired a good title before the service of the citation, might well resist the plaintiff's claim.

was proper to sell it for cash, and to divide the price. The under tutor did not intervene, and on the next day, (*Dec.* 28,) the judge of probates homologated the proceedings; and on the 21st of March, the land was adjudged to the defendant for $6000.

At the time of the sale of the defendant to the plaintiff, Bonin, the 14⅔ arpens sold, were four undivided parts of a tract of 22 arpens, owned in equal parts by C. Gravenbert, the minors Dumartrais, in right of P. Gravenbert, their mother, and F. F. Gravenbert, the defendant's wife, as part of her dower.

Brent, for the plaintiffs.—I. The defendant sold the thing of another. The land made part of his wife's dower. Neither he nor she could sell it; neither could both jointly. *Civil Code*, 328, *art.* 36.

II. If the land sold was the property of another, the sale is null. We find what a sale is in *Civil Code*, 344, *id.* 236, *art.* 63, 260, *art.* 8, 262, *art.* 9, 264, *art.* 31, 33. *Pothier*, *Vente*, 6, 18, 42.

In sales good faith ought to exist, and the seller ought to retain nothing of the titles. 1 *Pothier*, 232 & 234. *Civ. Code*, 356, *art.* 66.

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If the purchaser discover that the property does not belong to the seller, he can have the sale rescinded. 1 *Pothier*, 239—*Civil Code*, 354, *art.* 59, 356, *art.* 62 & 63. The want of title is a redhibitory defect, for which the sale can be cancelled. *Civil Code*, 356, *art.* 65, 67 & 70. 12 *Pandectes Françoises*, 268. It is not necessary that an actual eviction should take place, a danger of being disturbed is sufficient. 3 *Martin*, 236, 235 & 336.

Neither the husband nor the wife can sell dotal land; and when the law prohibits any thing to be done, if it be, the act is null. *Civ. Code*, 4, *art.* 12. Consequently, the sale of dotal land by the husband is null. Such has been the interpretation given to an article in the Napoleon Code, precisely the same as the corresponding one of that in ours. *Nap. Code*, 1554 & 1560. 18 *Jurisp. Code Civ.* 169. And such is the doctrine laid down by *Domat*, 47, 48. *contract of sale, tit.* 11, *sect.* 8, *p.* 8.

In this state the law prohibits the sale of dower land, *Civil Code*, 328, *art.* 36, and no sale contrary to law is valid. *id.* 4, *art.* 12.

III. If the sale was null, or if it ought to be rescinded, the district court erred in giving judgment for the appellees.

If it was void, as to part, it must be avoided as to the whole. *Civ. Code*, 350, *art.* 60, 356, *art.* 65—72.

An actual eviction by suit is not necessary; *id.* 354, *art.* 50. The law requires a suit in ordinary cases, as the only mode of ascertaining whether the property belongs to a third person. It is to establish this fact; but in the present case it is not necessary, because the fact can be established in another and as certain a manner, *i. e.* by the proof of its being dotal.

If the suit be necessary in the present case, there is no person to bring it. The wife can sue after the death of her husband only; and before this the money might be squandered, and where could the plaintiffs have relief? *Civil Code*, 330, *art.* 30.

It is admitted, that if Eyssaline knew that the land belonged to his wife; the sale was fraudulent and ought to be rescinded. To prove this knowlege, it suffices to refer to the marriage contract, and to the subsequent proceedings, which he thought proper to refer to, in order to acquire a title. If he did not know that he had no title when he sold, why did he deem it necessary to take these steps?

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It is enough for the plaintiffs to show, that when the defendant made the sale, the property was not his, and he knew it. This they have proven, as clearly as the nature of the case will admit.

The subsequent proceedings, to which the defendant resorted, are not binding on the plaintiffs, without their consent; nor are they according to law. They have derived no title from these proceedings, because Mrs. Eysaline was not a party to them; because there was no order from the judge, for the express sale of the property; because the family meeting was not composed of relations of the minors Dumartrais, but of strangers, while it is in evidence that their uncle was living, and could have been had; because, no valuation preceded the sale, as is required in all cases in which minors are concerned.

The extent of the defect of the defendant's title is perfectly immaterial. If he had no title to one half, and a good title to the other, the sale must be rescinded for the whole. For the plaintiff had no intention of purchasing one half of the land only.

Cuvillier, on the same side. The sale of the defendant to the plaintiff, Bonin, is null.

We are not to inquire, whether the defendant sold, as the agents of the owners, and for their account, or in his own right. Had he sold as agent, it is clear that the ratification of the owners would have imposed on the vendees the obligation of performing their part of the contract. If he sold in his own right, the plaintiffs have a right to claim a rescission of the sale; for the sale of the thing of another is null. *Civ. Code*, 349, *art.* 18.—*Jur. Code Nap.* 191.

The adjudication made to the defendant, one year after his sale to the plaintiffs, is null.

After the plaintiffs had openly declared their intention to insist on the nullity of the sale, the defendant procured, what he terms, a family meeting, in which the under tutor did not intervene. The meeting determined, that the land which was held by the minors Dumartrais, C. Gravenbert, and the defendant's wife, should be sold for cash. It was sold to the defendant.

This sale, we say, is null: for it was not attended with the formalities which the law prescribes. The land of a minor (or that in which he is interested) can be sold judicially only. *Civ. Code*, 187, *art.* 166.

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When several persons, either of whom is a minor, have an undivided property in land, application for a division must be made to the court, who directs a valuation of the land. *Id.* 187, *art.* 167. In the present case, such valuation was not made. The interest of the minors is, therefore, unaffected by the adjudication.

The land was dotal, and the husband could not alter it, even with the consent of the wife. *Civ. Code*, 330, *art.* 40.

The sale to the plaintiffs is a fraudulent one; as the vendor knew he was selling what did not belong to him; as one half of the land is not worth any thing, and the vendor did not inform the vendee of this; as, if he really purchased the part of C. Gravenbert, he ought to have given his title to his vendee.

The defendant knew the land did not belong to him, because it was the property originally of his father-in-law, at whose death it descended, in three undivided parts, to his wife, C. Gravenbert, her brother, and the minors Dumartrais.

When one knowingly sells the thing of another, the vendee may demand the rescission of the sale, if he was ignorant of it. 12 *Pand. Fr.* 269. *Poth. Vente.*

The defendant sold fourteen arpens and two thirds of land, without apprising the vendee, that a part of it was of no value. Judice deposes, that the front of the tract is of value to the depth of six arpents in depth: at this distance, the swamp begins. The land, in the proceedings after the death of the vendor's father-in-law, was estimated at $2500 only, and he exacted of the plaintiff the sum of 3000.—The sale was, therefore, fraudulent; and in case of fraud, the rescission of the sale may be demanded before the vendee be disturbed.

Brownson, for the defendant. It is contended that the land sold in the present case, was the thing of another; and that the sale is therefore void—the defendant denies the fact. He contends, that one half of the tract was vested in him by marriage contract, and that the other half was acquired by sale from Gravenbert.

Formerly, mere estimation operated as a sale to the husband. 6 *Martin*, 659.

Since the adoption of the *Civil Code*, mere estimation does not transfer the property, unless accompanied by an express declaration to that effect. *Civ. Code*, 328, *art.* 34.

But in this case the dotal object is not the

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property, but the *price*. The expression of the marriage contract is, that the property of the wife consists: "*en une somme de quatre mille neuf cent vingt une piastres, quatre vingt trois centimes*," &c. "*etant en valeur d'esclaves, bestiaux, terres*," &c. referring to an act of partition for a description of those objects. The law says, estimation does not transfer the property, "unless there be an express declaration." But does it say, that any express declaration is necessary, when the *price* is settled as dowry? If the object of the dowry is *property*, mere estimation furnishes no proof that the wife intended to make the husband responsible for the *price*, in case the *property* should perish or be lost.—But when the *price* itself is constituted as dowry, it is a pretty strong indication that the wife intended to secure its return, instead of the *property*. It shows, at all events, that the minds of the parties were fixed strongly on the *price*, and not so strongly on the *property*. It shows that the *price* is the principal object of attention and that the *property* is merely the accessary. What strengthens this construction is, that by a subsequent clause in the same contract a favourite slave with her child, the wife, it would seem, did not intend to transfer, are

constituted as a part of the dowry in the ordinary way, without any "express declaration."

In regard to the other moiety of the land sold, an objection has been started in this court to the evidence, which was furnished by the plaintiff himself, in the court below, of the title derived to Eyssaline from Charles Gravenbert. As I presume, a party cannot be permitted to object to his own evidence, it is unnecessary to enter into the question which the plaintiff now raises. To prove that the plaintiff himself introduced as evidence the document alluded to, I refer the court to the statement of facts, in the case of *Fusilier* vs. *Bonin & Chretien.*

The court will see, from the statement of facts, that the sale from Eyssaline to Bonin, took place on the 18th of March, 1820; that Bonin went immediately into possession, and that he has never yet been disturbed, by any adverse claim. It is pretended, however, that the defendant did not give him a title, to at least one half of the thing sold, and that the sale is, therefore, void. The *Civil Code* is cited, 348, *art.* 25, which says, that the sale of a thing belonging to another person is null. This is an abstract proposition, which it becomes neces-

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sary to examine. Does it mean, that the sale is so absolutely null, as to produce no effect between the parties? Or does it mean, that the sale is null as regards the owner of the thing? The former cannot, it appears to me, be its meaning, because it would be at variance with the rest of the article, which says, that "it may give rise to damages, when the buyer knew not that said thing belonged to another person." The article surely cannot mean to say, that the sale, though null with regard to the parties, may give rise to damages. This would be a contradiction in terms; because what is null absolutely, can produce no effect between those, in respect to whom it is null. I should suppose that the article means, that the sale is null in a certain sense, that is, so as not to operate a transfer of the property against the real owner; but that it is not null in a certain other sense, as respects the parties; but that between them it may give rise to damages. Such appears to have been the opinion of a commentator, on *art.* 1599, of the *Napoleon Code*, from which the article of our *Code* has been literally copied. I refer the court to a work entitled, "*Discussions of the Napoleon Code*," 3 *vol.* 452, *art.* 1598 & 1599; where the

following remark will be found. "*Au surplus, il resulte de l'article tel qu'il est énoncé maintenant que la vente de la chose d'autrui n'est nulle qu'en ce sens, qu'elle ne peut pas opérer la translation de propriété de la chose vendue, mais qu'elle est valable en ce sens qu'elle produit l'action de garantie.*"

It will, perhaps, be objected against the interpretation, that it was unnecessary for the legislature formally to declare, that the sale of the thing of another should not be binding against the real owner. That this principle is too plain, ever to have been doubted, and that legislation on the subject was unnecessary. In answer, I say, the subject was not so perfectly clear of doubt in the *Roman law*. I refer the court to the following text:—"*Si Presidi provinciæ probatum fuerit, Julianum nullo jure munitum, servos tuos scientibus vendidisse, restitueri tibi emptos servos jubebit. Quod si ignoraverint, et eorum facti sunt, pretium eorum Julianum tibi solvere jubebit.*" *Cod. lib.* 4, *tit.* 57, *l.* 1. Here we see a distinction was made. If the purchaser knew that the slaves did not belong to the vendor, he was bound to restore them to the owner. If he did not know that fact, and they had been delivered, the owner recovered the *price* from the vendor. Does not this strongly im-

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ply, that the law would protect purchasers in good faith, though, the property sold did not belong to the vendor? And yet, this was not really the *Roman law*, as will be seen on consulting the following authorities. *ff.* 50, 17, 54. *Id.* 18, 1, 4, 5, 28 & 70.

The true doctrine of the *Roman law*, on the subject of sales, appears to have been, that the sale of the thing of another, was good between the parties, to the contract, unless the purchaser knew, at the time of the sale, that the thing did not belong to the vendor, in which case it was merely void, and the purchaser had no recourse on the warranty. Perhaps a disposition among the *Roman lawyers* to theorise and refine, may, at times, have betrayed them into a stiff and artificial manner of explaining those deep and solid principles of natural justice and equity, which they have been so successful in delevoping. Perhaps too, in some cases, we may be disposed to complain, without much reason, and in attempting to avoid *their* errors, we may run some risk of falling into others, still more dangerous. If we had fallen by accident, upon the proposition to be found in the *Roman law*, that " the sale of a thing of another is

valid," without any of the accompanying explanations or restrictions, we should probably be struck with the injustice and absurdity of the principle. But when we come to learn, that the expression is only applied to the engagements arising between the parties, and not to the rights of him whose thing has been sold, we should probably view the subject in quite a different light. The same proposition, which might have appeared to us so objectionable in the abstract, when it comes to be explained in the correct, comprehensive, and satisfactory language of *Pothier*, loses all its obnoxious features, and we are immediately satisfied with the reason and justice of the principle. Thus, *le contrat de vente est un contrat par lequel l'un des contractans, qui est le vendeur, s'oblige envers l'autre, de lui faire avoir librement, à titre de propriétaire, une chose, pour le prix d'une certaine somme d'argent,*" &c. "*J'ai dit, de lui faire avoir à titre de propriétaire, ces termes qui repondent à ceux-ci, praestare emptori rem habere licere, renferment l'obligation de livrer la chose à l'acheteur et celle de le defendre, apres qu'elle lui a été livree, de tous troubles, par lesquels on l'empêcheroit de posséder la chose et de s'en porter pour le propriétaire; mais ils ne renferment pas l'obligation précise de lui en transfér-*

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er la propriété : car un vendeur, qui vend une chose dont il se croit de bonne foi être le proprietaire, quoiqu'il ne le soit pas, ne s'oblige pas precisément à en transférer la propriété."—*Contrat de Vente*—preliminary article. Again—"*On peut vendre valablement non seulement sa propre chose, mais même la chose d'autrui, sans le consentement de celui qui en est le propriétaire. Il est vrai que celui qui vend la chose d'autrui ne peut pas, sans le consentement du propriétaire, transferer la propriété de cette chose qui ne lui appartient pas.*" "*Mais le contrat de vente ne consiste pas dans la translation de la propriété de la chose vendue ; il suffit pour qu'il soit valable que le vendeur se soit valablement obligé de faire avoir à l'acheteur la chose vendue, et l'obligation qu'il en contracte, ne laisse pas d'être valable, quoiqu'il ne soit pas en son pouvoir de la remplir, par le refus que fait le propriétaire de la chose, de consentir à la vente.*" *Id. n.* 7.

The compilers of the *Napoleon Code* seem to have been dissatisfied with the abstract rule of the *Roman Law*, that "the sale of the thing of another is valid." They seem to have considered the theory absurd, and one which might lead to mistakes in its application. They wished to avoid the subtleties and nice distinctions which they imagined they perceived in the *Roman Law* on this subject, and to

adopt a legal phraseology which they considered more simple and natural. Prompted by these considerations, the *article* 1599 of the *Napoleon Code* was proposed at first as a project in a form somewhat different from that, which it possesses at present, was discussed in the council of state, and finally passed into a law in its present shape. We can collect from the whole discussion, which took place, that even under the ancient laws, it was believed that the sale of the thing of another was really null in regard to the owner of the thing—Yet, as there appeared to be some contradiction in some of the texts of these laws, and as the council were dissatisfied with the whole theory on the subject, thinking it gave rise to unnecessary and embarrassing subtleties and distinctions, it was thought that the article proposed would simplify the matter, and make it more intelligible. *Discussions of the Civil Code*, 2 *vol.* 457.

M. Tronchet, one of the council, observed, "*on a voulu également écarter les subtilités du droit Romain, car il est ridicule de vendre la chose d'autrui.*" Whether the council have attained the object of their wishes by the article in question, and whether they have not increased rather

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than diminished the embarrassments which existed under the ancient laws, may well be doubted. However this may be, one thing I think is evident, which is, that in changing the theory, they did not intend to change the practical rules of the ancient laws. When those laws say, that the sale of the thing of another is valid, the expression is used, as I have before shown, in reference to the obligations between the parties. As between them the sale was considered valid, it followed as a consequence from the theory, that it gave rise to the obligations of warranty. It bound the vendor to delivery, and warranty. It compelled the vendee to pay the price, according to the stipulations contained in the contract. It was, indeed, the basis of all the obligations between the parties. There was, to be sure, one case in which the ancient system regarded the sale as null, even between the parties; and that was, when the purchaser knew that the thing sold did not belong to the vendor. The sale was then pronounced simply void, and, of course, could give rise to no action on the warranty.—The vendee might probably have recovered the price, alleging it to have been paid with-

out consideration, but would not have been entitled to damages.

Now let us consider the consequences of our own legislation. The *Napoleon* and our *Code* declare, that the sale of the thing of another is null. But they go on to provide that, notwithstanding this nullity, it may give rise to damages "when the buyer knew not that said thing belonged to another person." This is the same as if they had declared that, though null for one purpose, it is valid for another. It is null, in fact, in regard to the owner of the thing sold. It can have no possible effect upon his rights. He may bring suit against the purchaser, and the latter cannot avail himself of a sale from one having no right to sell. But in regard to the seller, the case is different. He has entered into certain obligations, which he must be bound by. Among the chief of these, are delivery and warranty.—*Civil Code*, 348, *art.* 24.—When our *Code* calls such sales null, it speaks in reference to the owner of the thing. When the *Roman law* calls them valid, the expression is used in reference to the parties. Our law, makes the vendor liable to damages in case of eviction. The *Roman law* did the same.

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But then there is this difference, that in the *Roman law*, this right to damages was a theoretical consequence, resulting from the breach of a valid contract; whereas, in our *Code*, the contract is called null, but damages are expressly given by statutory provision, and without regard to theoretical consistency. Ours is the *Roman law*, without its theory. Like the *Roman law*, it takes away all right to damages when the vendee knew, that the thing sold did not belong to the vendor; and like it, probably it might in the last case, give an action to recover the price, as being paid without consideration. No change has, therefore, as I conceive, been produced by the adoption of the *Napoleon*, or our own *Code*, in regard to the practical effects of the contract of sale. I conceive, that these contracts still give rise to the same obligations between the parties, are to be carried into execution in the same way, are subject to the same limitations, and restrictions, as prevailed in the *Roman laws*, and are protected by the same sanctions. Indeed, how is it possible to call these contracts absolutely, and to all intents and purposes, null; speaking in reference to the parties, when they are yet, as they were

formerly, the basis of all the obligations between those parties? What does the vendee resort to for his recourse, in case of eviction? Is it not the warranty contained in the contract? How could he, with propriety, lay his case before a court, except by referring to this contract? What could he complain of? Is it not that the vendor, by the contract of sale, undertook to warrant him against eviction, and that in violation of this promise, he has suffered him to be evicted? And, I should be glad to know, how a man can be liable to damages, for not observing a contract which is null; that is, which is the same as if it did not exist? If the breach of a contract can produce damages, I should suppose it was sufficient proof that it could not be null; certainly, with regard to those against and in favour of whom it might produce damages. The contract may, with perfect propriety, be called null, in regard to the owner of the thing sold; because, in regard to him, it can produce no possible effects. But in respect to the parties, the case is widely different. The law does not, with regard to them, consider the contract of sale the same, as if it did not exist. The plaintiff himself must admit,

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that, as to the seller, it produces the obligations of delivery and warranty—*Civil Code*, 348, *art.* 24;—and as to the buyer, the obligation of paying the price—*Ibid.* 360, *art.* 82.—The law could not intend to say, that these obligations only exist, when the thing sold really belonged to the vendor; because, in that case, there never would be occasion for one of these obligations, that of warranty against eviction. The vendor warrants against *legal* evictions, not *illegal* ones; and if, at the time of the sale, he was the real owner of the thing sold, it is obvious there could be no *legal* eviction. The vendee being possessed of the vendor's title, and that being a good one, as would be the case if the vendor were the real owner at the time of the sale, it is plain that the vendee could never be evicted by a title *better* than his own; and consequently, could never be *legally* evicted. It is only when the vendor is not the real owner of the thing sold; and consequently, when he sells the thing of another, that there is any possible occasion for the obligation of warranty. It is only in *that very case*, and *in no other*, that the law has given rise to the obligation of warranty, and to an action for the breach of it.

I have dwelt somewhat at length upon this point, because the article 1599 of the *Napoleon Code* has produced a decision in one of the provincial courts of France, which is absolutely at variance with the ancient laws, and which is justified, or attempted to be justified, by a supposed change in the law, occasioned by that article. The case I allude to, is one decided by the appellate court of Rions, cited from a work, entitled 18 "*Jurisprudence du Code Civil*," 169. The decision took place in 1810, and the opinion of the inferior tribunal was reversed. It will be seen, however, that it was a case of the first impression; and that in the reasoning of the judges, there is no reference to authorities; no examination of the ancient laws. The editor, in a note at the head of the case, remarks, that there is another decision reported in the *15th vol. of the same work*, 139, "*qui est basée sur d'autres principes que ceux qui ont été adoptés dans l'espèce suivante, et qui nous paroissent préférables.*" As the *15th vol.* is not now within my reach, I am obliged to content myself with the above reference to it.—I do not deny that the opinion of the court of Rions supports the pretensions of the plaintiffs. But I will oppose to the au-

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thority of that case, another reported in the 17*th vol. of the same work*, 437–8–9.—A suit was brought by the purchaser to annul a sale, made to him by a natural tutor, of real property belonging to his ward, and which had been sold by the tutor, without pursuing any of the formalities required by law for the validity of such sales. The cause having been decided against the plaintiff in the court below, an appeal was taken to the appellate court of Turin, where the judgment below was confirmed. It was contended in that case, as it is in this, that the vendor had sold the thing of another; that the sale was in contravention of the article 1599 of the *Napoleon Code*, and was therefore void. The court had occasion particularly to examine the ancient laws, to inquire how far those laws on the subject of sales had been altered by the *Napoleon Code*, and whether any radical change had been produced by it. Their opinion may pretty clearly be gathered from the following observation—*page* 439. "*Ce n'est pas apporter des limitations a l'article* 1599, *et moins encore le rendre illusoire, que de classifier le contrat dont il s'agit sous sa vraie nature et de le demontrer etranger à ces dispositions, mais c'est eviter d'étendre à*

des contrats expressément permis et valables, une loi prohibitive uniquement dirigée à éliminer les fraudes et les abus, qui pouvaient naître de l'ambiguité et de la mauvaise interpretation de la loi Romaine."

It will perhaps be said, that the object in the contestation in the two cases was different—that the case of Turin relates to minors' property, and that of Rions to dotal. But what difference, I would ask, can that make? In the case of dotal property the nullity was claimed, not because the property was dotal, but because it did not belong to the vendor. It is true, the husband cannot in general sell dotal property; but it is equally true, that the tutor cannot sell the real property of the minor, though the judge may cause it to be sold on observing certain formalities. If then the tutor sells the real estate of his ward, what is it but to sell property which does not belong to him? Does the husband any thing more when he sells dotal property? It is said, the sale of dotal property is prohibited, except in certain cases and under certain circumstances, and that this prohibition imports nullity. So also is the sale of minor's real property prohibited, except in certain cases, and under certain circumstances, and then is only permitted with

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certain formalities. And does not this prohibition with regard to minor's property, equally import nullity? The truth is, the difference in these two decisions did not arise from any supposed contrariety in essential facts; they were both decided upon principles, which are general, and which have equal application to the one case as to the other; they are opposed to each other in spirit and in principle; they cannot be reconciled; they cannot stand together. If the court of Rions was right, the court of Turin was wrong. If, as a general principle, made *sacramental* by the *Napoleon* and our own code, the sale of a thing belonging to another person is null, *ipso facto*, *de plein droit*, as is contended in behalf of the plaintiffs, then the sale of *minor's* property by a tutor, not authorized, would be as void as the sale of *dotal* property by a husband not authorized. Yet this court has lately decided in the case of *Melançon's heirs* vs. *Duhamel* in conformity with the opinion given by the court of Turin, that the nullity of the sale, in regard to minor's property, is merely *relative*, and that it cannot be claimed by the purchaser.

The plaintiffs' counsel have quoted the *Pandectes Françoises*, 12 *vol.* 268. But this au-

thority is merely the opinion, it may be, of a distinguished civilian, given, however, hastily in the progress of an extensive work, and without, as it appears, any particular examination of authorities.

It will not be contended by me, and I presume not by the counsel on the other side, that the opinions and decisions of foreign tribunals and jurists are binding authority upon this court. When, however, they relate to mere questions of customary law, and are uniform, they ought unquestionably to have some influence as mere *precedent* and *authority*. But the present is a question which relates to a written *Code*, recent in its origin, and of which this court is probably as able to give a construction as the provincial courts of France. This court will, no doubt, listen at all times with great respect to the opinions of eminent jurists; and, had the opinions and decisions quoted been uniform, they would certainly have been entitled to great weight. But being, as I have shown, contradictory, it is for the court to say which of them shall be followed. It is for this court to decide, whether a vendee, being put in possession of the thing sold to him, remaining undisturbed in that possession by any adverse

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claim, can himself assert the nullity of the sale, on pretence that the vendor had no title.—This is altogether a new question in this country. The present is, I believe, the first suit which has depended for its success wholly upon the establishment of such a principle. In this view of it, the subject becomes important. By way of defence, want of title has been frequently urged as cause for demanding security, and for delaying payment until security should be given; but never for annulling the contract. Observe the progress of these pretensions—they commence with the well known principle recognised by this court, that the defendant may delay payment, when disturbed by a suit actually brought, until security shall be given. 7 *Martin*, 223. *Civ. Code*, 360, *art.* 85. *Poth. Contrat de Vente*, *n.* 282. *Dig. lib.* 18, *tit.* 6, *l.* 18 *s.* 1.

Pushing the principle a little farther, it is pretended, that security may be demanded, not only when the vendee is disturbed by a suit actually brought, but also when he has reasons to apprehend a future disturbance. And stretching the doctrine to its utmost limits, reasons for apprehending a future disturbance on account of a defect in the ven-

dor's title, give a right not merely to demand security, for that had been offered in the present case, but to annul the sale. Nay, it is pretended that this nullity is so absolute, that it cannot be effaced even by the subsequent perfection of the title. And this is the point to which these pretensions have arrived in this suit.

The term "newfangled," could never be applied with more perfect propriety than to these pretensions; for they are, I believe, contrary to all the laws of all countries. They are certainly contrary to the *Roman law.* That law had said, as this court has, that security may be demanded when the vendee is disquieted by a suit actually brought. The expression is "*quæstione mota*," and I have the authority of this court for saying, that it means a "judicial investigation of title." That law had said in express terms, as I am persuaded this court will say, that the purchaser in possession cannot, until evicted, prosecute the vendor, on pretence that the thing sold did not belong to him. *Code, lib.* 8, *tit.* 45, *l.* 3.— The opinion of *Pothier* is to the same effect: "*Quand même l'acheteur découvriroit que le vendeur n'était pas propriétaire de la chose qu'il lui*

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a vendue, et conséquement qu'il ne lui en a pas transfére la propriété, cet acheteur, tant qu'il ne sera inquiété dans sa possession, ne pourra pas pour cela pretendre que le vendeur n'a pas rempli son obligation." *Contrat de Vente*—preliminary article.

But the *ancient laws* are said to be repealed by the *Napoleon Code*, and the decision of the court of Rions is quoted as evidence of the repeal. If that court had referred to these laws, had compared them with the article 1599 of the *Napoleon Code*, had alleged a repugnance betwen them and this article, and from them had inferred the repeal, the decision would have been entitled to more consideration than it is. But instead of that, their opinion is built wholly upon the *Code*. We see nothing which indicates the least knowledge of the former laws. No inquiry is made into the motives which led to the adoption of the article in question. The principle assumed by the court, and which forms the basis of their reasoning, is, that the sale of the thing of another is absolutely void, even between the parties; and, therefore, the vendor in possession, though undisturbed, may assert its nullity, by original action. So far from expressly saying that these

ancient laws had been repealed by the *Code*, they do not appear to have known of their existence. And who can say what effect they might have produced upon that court, had they been quoted and considered? By the court of Turin, they were considered together, with the motives for adopting the article 1599, which were, says the court, "*à éliminer les fraudes et les abus qui pouvaient naître de l'ambiguité et de la mauvaise interpretation de la loi Romaine.*" Had the *Roman law* been free from ambiguity and well understood, there would have been no need of the article. It was intended to *correct*, not to *repeal* the *Roman law*. It would be a pernicious and absurd application of this *corrective* measure, to make it a pretence for introducing all the untried, but obvious evils of a new system; a system, too, not recommended by any very evident advantages, but attended with certain and inevitable mischiefs, such as bad faith promoted, litigation encouraged, and all those ruinous consequences, which cannot be enumerated, but which always result from sudden changes.

What shows, pretty conclusively to my mind, that the law does not contemplate a proceeding, such as is resorted to in this suit, is, that it

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has provided no rules for it. Within what time are such actions prescribed? How long may the vendee possess before he loses the right of bringing such a suit? What damages, if any, is he entitled to? What is to be done with the rents and profits? No answer could, at present, be given to these questions, because the law would, as yet, have furnished no rules on the subject.

On the ancient plan, however, we have a complete system ready furnished with details extending to every possible exigency. Thus, when the vendor with no bad faith, sells the thing of another, and the vendee is put in possession, he has no recourse until evicted.—Prescription does not begin to run against the action on the warranty, except from eviction. Rules are given for regulating the damages. The rents and profits belong to the vendee until he has judicial notice of a better title.—As long, however, as possession is not given, the sale is considered so incomplete that the vendee is permitted to claim its nullity, if he discovers a defect in the title. *Code, lib.* 8, *tit.* 45, *lex.* 5.

Even after delivery. the vendee may, *before eviction*, assert the nullity of the sale, if he can

establish fraud in the vendor. But then the fraud must be *real*, not *constructive* merely. It must amount to what, in law, is called *malum dolum*. *Dig. lib.* 19, *tit.* 1, *lex* 30, *s.* 1.

If I mistake not, also prescription is acquired against these actions, founded upon fraud, in one year. It appears to me, that this court will require something more satisfactory, than what is to be found in the *Napoleon* or our *Code*, before they will consent to set aside the whole of this ancient system, as venerable for its antiquity as it is for the justice of its provisions.

The gentlemen urge, that they are within the provisions of the *ancient laws*, as they have alleged fraud in this case. I answer, that it must be *proved* also. Fraud, I admit, will vitiate any thing. But it is one thing to *allege*, and a quite *different* thing to *prove* it. It is true, the plaintiff has alleged it abundantly in his petition, but has not attempted to produce any proof in support of these allegations.—He seems to have supposed that this court, in violation of a known maxim of the law, will presume its existence, and that, too, in the face of evidence to the contrary.

Dolum malum is thus defined. "*machinatio-*

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nem quandam alterius decipiendi causa, cum aliud simulatur et aliud agitur." *Dig. lib.* 4, *tit.* 3, *lex* 1, *s.* 2. Now I ask the court, if there is any thing in the conduct of the defendant in this case which comes within the above definition. Where is to be found any contrivance to cheat? The transaction took place in the neighbourhood where the plaintiff resides, where he has always resided. He knew the parties interested, and was acquainted with the land. He had always lived within a stone's throw of both. He knew perfectly well, that Eyssaline derived his title to the land, in part, from his wife. He supposed, as did Eyssaline, that this title authorized the sale. So far from there being any *machinationem decipiendi causa* on the part of the defendant, he did not so much as solicit the bargain. It was the plaintiff who sought it, and the evidence shows how strict the defendant was in adhering to his original terms, a point upon which he would have been much less punctilious had he been disposed to obtain, by dishonest means, the price of a thing to which he knew he had no right.

Once more, and I quit this branch of the subject. This case does not come within the

hypothesis stated by the plaintiff's counsel. One half of the thing sold, confessedly belonged to the defendant at the time of the sale. It was not, therefore, on any supposition, the sale of a thing wholly belonging to another person. But it is said, if the vendee loses part of the thing sold, owing to a defect in the title, he may cause the sale to be cancelled for the whole. *Civ. Code*, 354, *art.* 60. The answer is, that he has, as yet, lost no part of the thing sold to him. The law has only given this remedy in case the vendee shall be *evicted* of part; not merely in case he shall be in danger of eviction. And this furnishes an additional reason for believing, that the law never contemplated such an action as this ; otherwise it would have made some provision for it. The law has provided a remedy for a certain injury. That injury is uniformly described in the same way. It is called *eviction*, a term which relates to *possession*, not to *title* merely. It is reasonable to presume, therefore, that so long as that possession remains undisturbed there can be no occasion for the remedy.

It is contended by the defendant, that his title now being complete, the plaintiff has no longer any ground of complaint. In opposition to this matter of defence it is said, that

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the proceedings of the meeting of the family are not legal, because the meeting was composed of *friends*, and not *relatives*. It is pretended, that the record shows that there were *relatives* which were not called. In reply, I say, that the process-verbal of the meeting states, that *friends* were called for the want of *relatives;* and that the court will not indulge presumptions against the record. I say also, that in point of fact there were not *relatives* within the parish in which the minors are domiciliated. But even if objections could be alleged against the validity of these proceedings, they cannot affect the sale to Eyssaline, as that sale was made by licitation, and for purposes of partition. It appears to have been ordered by the judge, on sufficient proof that the minors' interest in the land could not otherwise be separated from that of their co-proprietors; and in such case, a meeting of family is not necessary. 3 *Mart. Dig.* 134, *n.* 21.—Even dower property may be sold, situated as this was.—*Civil Code*, 330, *art.* 40.

It is said again, that there is no proof that this sale has ever been demanded by Eyssaline or his wife. But sufficient proof of that fact may be found in the process-verbal of the

sale, which recites, that it was made at the request, among others, of Madame Eyssaline, authorized by her husband, and also of Joseph Eyssaline; which process-verbal is signed at the bottom by both. The same fact is also stated in the process-verbal of the meeting of family, and forms one of the motives for recommending the sale in regard to the minors. Lastly, it is contended, that admitting the title now to be perfect, yet, as it was not so at the date of the sale, the plaintiff ought not to be compelled to keep the land. In this pretension the plaintiff has unconsciously betrayed the true motive for instituting this suit. It was done that he might not be compelled to keep the land. Had he appeared as a humble supplicant for justice, presenting a case of simplicity over-reached, and had he shown that he was still liable to lose the object of his purchase by a better outstanding title, he would certainly have been entitled to commisseration, if not to relief. But instead of that, he exhibits himself as an adventurer in a law suit, struggling to break loose from engagements, voluntarily and freely contracted, and with nothing to excuse him for his meditated bad faith. How perverse must be the disposition of that man, who complains against

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the enforcing of a contract according to his own original intentions in entering into it. But the law is resorted to again, and the plaintiff seems to expect that it will aid, not in preventing a violation of the contract, but in promoting it. The famous case decided by the court of Rions is again triumphantly quoted upon me. I must confess that that extraordinary case goes the full length of supporting the plaintiff in his pretensions. In opposition, however, to the authority of that case, I refer the court to a work, entitled "*Le Droit Romaine*," 5 *vol.* 279. "*Si, avant que le contrat soit déclaré nul, le vendeur acquérait la chose qu'il a livrée, l'acheteur pourrait il encore le faire annuler? Je ne le crois pas. L'obligation du vendeur se trouve completement remplie. L'acheteur acquier la propriété, puisque le consentement des deux parties subsiste sur l'objet du contrat, et que celuici a reçu son entière exécution.* This opinion is in conformity with the *Roman law. ff.* 21–2, 57.

MATHEWS, J. delivered the opinion of the court.* This is an action for the rescission of the sale of a tract of land, on the ground that the vendor had sold the thing of another;

*PORTER, J. did not join in the opinion, having been of counsel in the cause.

that the sale was fraudulent; and that the property sold was dotal.

There was judgment for the defendant, and the plaintiff appealed.

The important facts of the case are the following. In March, 1820, the defendant sold to the plaintiff Bonin, a tract of land of 14⅔ arpens. front on the Teche. In the month of December, of the same year, having discovered that he had purchased what did not belong to his vendor, he gave public notice of his intention to procure a rescission of the sale, and restitution of the notes given by him for the price, which were endorsed by the other plaintiff; and for this purpose commenced the present suit, on the 5th of November, 1821, as appears by service of the citation.

A few days after this public notice, but long previous to the institution of this action, a family meeting, composed of the friends of the minors Dumartrais, was called, and was of opinion, that a tract of land mentioned in its proceedings could not be conveniently partaken by division in kind; and that, therefore, it was proper to sell it for cash, and divide the price. The under tutor did not intervene. The judge of probates homologated

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the proceedings, and the 21st of March, 1821, the land was adjudged to the plaintiff for 6000 dollars.

At the time of the sale, as above stated, the 14⅔ arpens sold were two undivided parts of a tract of 22 arpens, owned in equal portions by C. Gravenbert, the minors Dumartrais, in right of P. Gravenbert their mother, and T. F. Gravenbert, wife of the defendant, being a part of her dower.

It further appears by the evidence in the case, that C. Gravenbert sold his undivided third part of said 22 arpens to the defendant by act under private signature, previous to the sale made to the plaintiff of the two thirds by metes and bounds, as expressed in the deed of conveyance executed in pursuance of the latter sale.

From these facts it appears to us, that three principal questions of law arise in the cause.

1. Has a vendee of dotal property, sold by the husband whilst he remains in undisturbed possession, a right to claim a rescission of the sale and restitution of the price, on the ground of the contract being null, either absolutely or relatively, *i. e.* void or voidable?

2. Was the sale, made in pursuance of the family meeting, such as to transfer the property to the defendant?

3. Can a husband who sells the dotal property of his wife, and afterwards acquires an absolute right to it, avail himself of such posterior right, in opposition to the vendee's claim, for a rescission of the contract of sale, when the complete title has been obtained previous to instituting suit for rescission?

In examining these questions, we will first consider the two last; for, should their solution be found favourable to the appellee, it will be unnecessary to answer the first.

Previous to the act of 1809, it was made the duty of tutors, under certain formalities prescribed by law, to proceed to the sale of the moveable and immoveable property of their wards. *Civil Code*, 68, *art.* 56. The law on this subject was altered in relation to uncultivated lands, &c. by the act above cited. *Martin's Digest*, *p.* 128. In the same act it is provided, that the previous rules there established, and also those of the *Code* "which prohibit the sale of the estate of minors in certain cases, or to authorize the sale only if it should amount to the estimated value of said estate,

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shall not be construed to affect such sales as are forced upon minors, or when minors have an estate in common with other persons who apply for a division of said estate, when such division cannot take place but by licitation," &c.

In the case now under consideration, it is true that the partition of the property, common to the minors Dumatrais and their co-proprietors, does not, in the first instance, seem to have been solicited by the latter; but all parties interested, the minors by their father and natural tutor, and the others by themselves, appear to have acquiesced in the necessity of partition by licitation, as well as in all other proceedings by which the sale was made by the parish judge, as evidenced by their signatures to the process-verbal of said proceeding; which, in our opinion, is equivalent to an original expression of their wish to cause legal partition of the common property by petitioning the judge to that effect. We therefore conclude, that the sale was made in such manner as to transfer the property to the defendant, who became the purchaser. Part of the undivided property being dotal, did not exempt it from subjection to sale in the present case. *Civil Code*, 330, *art.* 40.

Before entering into any discussion of the third question, it is proper to observe, that we are of opinion that the evidence of the cause does not establish the fact of fraud or *dolum malum* against the appellee.

Decisions of *French tribunals*, and *dictums* of jurists are resorted to and relied on in support of both the affirmative and negative of this question. The case cited from the 18*th vol.* of the work, entitled "*Jurisprudence du Code Civil*," as decided by the court of Rions, establishes two principles much opposed to the pretensions of the defendant, viz. that the sale of dotal property is null, and that acquisition of title, subsequent to the institution of an action to rescind the sale, will not cure such nullity. Were we disposed to give full force to the principles recognised by this decision, as being rendered on articles of the *Napoleon Code* similar to those of our *Code*, invoked by the plaintiffs, but which we believe to be at least doubtful as to correctness, still there is a clear distinction in the present case from that cited. There it seems that suit had been commenced to annul the sale before the defendant acquired a good title to the property sold: here the title was acquired before suit

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commeneed. This circumstance places the appellee's cause in a situation more favourable to his pretensions than that of a seller in the case put by *Le Clercq*, in his work, entitled "*Droit Romain*," &c., in vol. 5, p. 279; wherein he supposes the case of the purchaser being ignorant that he bought the thing of another, which was delivered to him by the seller; and admits, that the buyer might have the contract declared null, on restoring the thing, &c. But if, before the contract be annulled by competent authority, the seller should acquire the thing which he had delivered, it is the opinion of the author, that the purchaser would then not have power to cause the sale to be annulled; because every obligation on the part of the vendor would be fufilled: the purchaser acquires the property in the thing sold as well as the possession; and, consequently, the contract stands fully executed. The principle established by the latter part of the case as stated, we are inclined to think correct; evidently so, in a case where no action for rescission has been commenced.

Considering the sale made by the parish judge, in pursuance of the representation of the family meeting, with the consent of all the

co-proprietors, as good and translative of property; and that, by it, the appellee acquired a complete title to the land which he had sold to the appellant, before the institution of the present suit; we are of opinion, that there is no error in the judgment of the district court.

It is therefore ordered, adjudged and decreed, that it be affirmed with costs.

VIGNAUD vs. *TONNACOURT'S CURATOR.*

APPEAL from the court of the fifth district.

The court of probates has exclusive jurisdiction of all claims against a vacant estate.

PORTER J. delivered the opinion of the court. This action was commenced in the district court to recover of the defendant, curator of a vacant estate, a sum of money alleged to be due by it. The defendant pleaded in abatement, that the court had not jurisdiction of the case; that the settlement of all matters appertaining to the estates of deceased persons, the liquidation of their accounts, and every other act relative to the same, belonged, in the first instance, to the

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court of the parish where the case arose, viz. in the parish of St. Martins.

The act of 1813, (2 *Martin's Dig.* 188) which established the tribunal in which this action was commenced, confers on it jurisdiction "in all civil cases" that may arise in the parish where it sits. These expressions are sufficiently comprehensive to embrace that before us; and the jurisdiction must be maintained, unless at the time of passing the act the law refused an action in the ordinary way, to claims circumstanced like this; or unless the jurisdiction, if it did exist, has been since taken away.

The defendant has assumed the affirmative of both these positions.

In support of the first he has urged, that the administration of successions is reduced to a perfect system; the primary objects of which are, to secure to all an equal distribution, and to guard and protect the interests of minors; that if suits can be carried on before other tribunals than that where the succession must be regulated, that these objects will be defeated, and the estate unnecessarily burdened with costs.

As far as our knowledge of the practice

extends, we believe that it has been usual to bring suits such as this. This practice, contemporaneous with the establishment of the court, is somewhat against the plea, now for the first time presented, that it wants jurisdiction; as novelties should be distrusted in all subjects, and more particularly in law than any other. Still, if our inquiries bring us to the result that the action cannot be maintained, the usage under the statute ought not to affect our decision, as practice is never permitted to control the law, though, in doubtful cases, it may well serve to explain it.

By the provisions of the *Civil Code*, curators of vacant estates, and absent heirs, are forbidden to pay any debts due by the vacant estate, until three months after the death of the deceased, or after the same has become known for the purpose (as the law declares) of allowing sufficient time to the creditors to present their claims. By the same article, containing these regulations, the judge is authorized to extend the term for another period of three months, making in the whole six.—*Civ. Code*, 178, *art.* 136.

Within this time, during which the curator is forbid to pay, we think it manifest the cre-

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ditors cannot be permitted to sue; for the former is not in fault, and judgment could not be given against him, without violating the express commands of the law.

The article next following that just cited provides, that even after this delay the curators of vacant estates, and absent heirs, shall not proceed to the payment of the debts of the estate until they have previously obtained the authorization of the parish judge by whom they have been appointed.

It would seem, then, that the law does not contemplate that separate suits should be brought to accelerate or enforce payment; for after judgment rendered, the curator cannot pay without an order of the court of probates. This necessity of obtaining the authority of another tribunal, before the decree of the district court can be carried into effect, furnishes a very strong argument against its jurisdiction; for we are not permitted to conclude that the legislature intended so vain a thing as to allow of an action at law, where the benefit of judgment could not be obtained:—make the decrees of a superior court subject to be controlled by an inferior one, and have the estate burdened with costs, and no useful object attained by it.

If we were to adopt the other alternative, that it was contemplated suits might be brought, and that an advantage could be obtained by doing so, then all the creditors would be obliged to commence actions in order to be put on an equality; which would lead to the monstrous inconvenience, that the whole of the estate would have to be settled through suits at law.

In case of insolvency the consequences would be the same to the estate, and in addition to the injury done to all who had demands on it, such proceedings might completely destroy the rights of privileged creditors. Under these circumstances, the necessity of classification by one tribunal, which can take cognizance of all the claims, is imperious, and that tribunal our law designates to be the court of probates. *Civil Code*, 178, *art.* 137. *Febrero* puts such a case as that before us, as one which authorizes a *concurso* of creditors. *Febrero addic. p.* 2, *lib.* 3, *cap.* 3, § 2, *n.* 39.

It is true, the reasons are not so strong in favour of this course where there is enough to satisfy all the debts: yet, as the law has declared that the order of the judge of probates shall be necessary even in that case, we do

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not see how any court can give judgment that the curator shall pay without that order. And we therefore conclude, that the creditor should present his claim to that tribunal in which is vested the power to enforce its discharge.

We have not had any difficulty in coming to this conclusion, when the debt is acknowleged by the curator, and the only object of the suit is to obtain execution. We have had more, where the claim is disputed and the action is brought to establish its existence. But even in that hypothesis, the result must be the same. We have already seen, that in cases of this kind, the district court could not execute the judgment it might render. Consequently, the only object of a suit there, would be to ascertain the debt; and it appears to us, that jurisdiction for the purpose of inquiry alone is not vested in that tribunal. Indeed such a duty would seem inconsistent with the idea we attach to courts of justice, whose attribute is to examine rights for the purpose of enforcing them. As the law has vested the judge of probates with the power of ordering payment of the demands against the estate, or rejecting them, it has necessarily conferred on him the right of examining into their justice.

The course to be pursued, under the opinion just delivered, will advance, not retard the recovery of debts due by a vacant estate, as they can be more speedily liquidated, and the succession settled, when one court takes cognizance of all the claims presented.

In the case of *Donaldson* v. *Rust, curator of Alsop*, 6 *Martin*, 260, the objection to jurisdiction in any other tribunal but that of probates was taken; but as the exception does not appear to have been pleaded in the inferior court, no notice was taken of it in the opinion delivered. The district court, however, had clearly jurisdiction in that case; for the suit was not brought to obtain satisfaction of any demand against the estate, but to recover specific property belonging to the plaintiff, in the hands of the curator.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Brownson for plaintiff, *Brent* for defendant.

FUSILIER vs. *BONIN & AL.*

APPEAL from the court of the fifth district.

The endorsement of a note, is not restrained by its being

MARTIN, J. delivered the opinion of the

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signed *ne varietur* by a notary.

court.* The defendants, sued on their promissory note, endorsed to the plaintiff before its maturity, pleaded that it was given for the price of a tract of land, which the plaintiff's endorser sold to them without his having any right to do so, and that the plaintiff had notice of this, as the note was signed *ne varietur* by the notary.

The plaintiff had judgment, and the defendants appealed.

This case is not easily distinguishable, as to the first objection, from that of *Hubbard & al.* vs. *Fulton's heirs*, 9 *Martin*. 87, in which we determined that "although the matter, pleaded in avoidance of the claim, would have affected it in the hands of the original payee, it could not do so in those of a fair endorsee."

The defendants' counsel has, however, endeavoured to distinguish it. He holds, that "the holder must have known that the consideration of the note was the land sold, and so took it, subject to the defence relating to the land; and from all the circumstances, the defendants' equitable defence must be let in."

He cites, in support of his position, the case

* PORTER, J. did not join in this opinion, having been of counsel in the case.

of *Ayers* vs. *Hutchins & al.*, 4 *Mass. Rep.* 370, *Bigelow's Digest*, 501, in which the court held, that "if the endorsee of a negotiable note receive it under circumstances which might reasonably excite suspicion that the note is not good; he ought, *before* he takes it, inquire into its validity; and if he do not, he must take it subject to any legal defence which might be made to a recovery by the promisee."

We cheerfully recognise the exception, which this case makes to the general proposition, which was the basis of our decision in that quoted: and our only inquiry, in the present, must be whether the note or its transfer was attended with any circumstance that might *reasonably create suspicion.*

The counsel presents as one, the appearance of the words *ne varietur*, on the face of the note, with a date and the signature of a notary. We are unable to discover how the appearance of these words could *reasonably create suspicion.*

Generally they are written on instruments to ascertain their identity at a subsequent period. On promissory notes, like the present, they are of great use in facilitating the cancelling or raising a mortgage, given to se-

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cure the payment of the sum mentioned in the note. They may serve in pointing out the notary, in whose office will be found the act which contains the evidence of the contract, in which the note originated.

The case determined in Massachusetts, on which the defendants' counsel relies, recognises the obligation of a person to whom a negotiable note is offered, to make any inquiry into its validity, to the only case in which circumstances reasonably create suspicion. The circulation of notes would be much checked and embarrassed, if it were believed to be the duty of any person, who receives one, to inquire into the fairness of the transaction in which it originated, wherever the signature of a subscribing witness or of a notary afforded the opportunity of doing so. Nothing, in our opinion, imposes the obligation of such an inquiry, but the knowlege of such circumstances as reasonably create suspicion.

In the present no such circumstance is alleged, except the notice conveyed on the face of the note.

The plaintiff. on receiving the note, was thereby informed it had been thought proper to identify it, and that he might be informed of

the transaction in which it was given by examining the minutes of a given day, in a particular notary's office. Were we to say, that it was his duty in such a case to make the inquiry, we would likely be bound to say that the subscription of a witness to a note imposes the same obligation, since it generally affords the same facility. No one can contend that it does.

It is, however, urged that the vendees, in requiring the identification of his note, secured the right of resisting payment, on just grounds, even after a fair endorsement, as he thereby gave notice to all endorsees that the note was the consideration of the sale. In some instances the maker of a note mentions therein what he has received as the consideration of his promise, using the expression *value received in a horse*, a slave, or in merchandise, or the like. Yet, it never was contended that the circumstance of the endorsee being thereby apprized that the note was given to secure the payment of a horse, a slave, or goods, placed him in a different situation than if the note was, in the ordinary way, *for value received*; that he was bound to ascertain whether any redhibitory vice in the slave, &c. pro-

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tected the maker. Now the knowlege that *land* was received as the consideration of the note, cannot vary the case. It creates no reasonable suspicion.

Had the plaintiff, before he took the note, called on the notary and examined the act which contains the evidence of the contract in which the note originated, he would have learned that it was given to secure the payment of the price of a tract of land, which the maker of the note had purchased from the person who offered to endorse it. This would have dispelled, rather than created suspicion.

It is true, the purchaser of a tract of land, who has given a negotiable note to secure the payment of its price, may resist the claim of his vendor, if he have been, in the mean while, evicted. But the very circumstance of his giving such a note, is evidence of his consent to forego this right, if the note be fairly endorsed away before maturity.

The purchaser of a horse, a slave, a ship, of goods, a borrower of money, are precisely in the same situation, as long as the claim remains in the hands of the vendee; they may oppose to it any fair means of defence. But if a negotiable note was given

and endorsed over before maturity, the claim of the endorsee cannot be resisted, on account of any circumstance of which he had no knowlege.

Since the establishment of banks in this state, vendors have often found, in the negotiable paper of vendees, a very easy and speedy mode of receiving the price of properperty sold on a credit. The latter, no doubt, found therein some diminution in the price, which would not have been yielded, if the former had not thereby been enabled to receive their money, before payment was effected by the latter.

In the present case, the notarial act particularly and formally states, that notes were given for the express purpose of enabling the plaintiff's endorser to anticipate the receipt of the purchase-money. This the vendor might fairly stipulate for, and the vendee, by acceding to the stipulation, forewent the right of resisting the claim of an endorsee, and retained only a claim against the vendor.

Nothing enables this court, and justice forbids, to place either of the parties in a different situation than that in which the contract, he acceded to, places him.

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It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Brownson for the plaintiff, *Brent* and *Cuvillier* for the defendants.

LANGLINI & WIFE vs. *BROUSSARD.*

A wife cannot alienate her paraphernal effects without the consent of her husband.

A variance between the allegation and proof must be taken advantage of on the trial.

APPEAL from the court of the fifth district.

PORTER, J. delivered the opinion of the court. The petition avers, that the defendant, by force and arms, took possession of twenty five horned cattle, the property of the plaintiffs, and refuses to give them up.

The answer contains a general denial, and an averment, that the defendant, as agent for one Don Lewis Bouderau, received by the consent of the plaintiff, Madame Langlini, mother of the said Don Lewis, fourteen beeves, being the supposed portion coming to him in the undivided estate held between them.

The evidence establishes, that the defendant with the consent of the wife, took fourteen head of cattle, marked with her brand:

but that the husband, so far from assenting to the transaction, expressly forbid him to receive them. The cattle were marked with the brand of Mrs. Langlini's first husband.

There was judgment for one of the plaintiffs, Madame Langlini, and the defendant appealed.

The plaintiffs contend, that the judgment should be affirmed, because the testimony establishes the right of property; and they rely on the *Civil Code*, 334, *art.* 58, which provides, that the wife can neither alienate her paraphernal effects, or appear in a court of justice respecting the same, without the consent of her husband.

The defendant insists, that the beeves belonged to the minor heir and his mother in common, and that she had a right to alienate them without the husband's consent; that the petition states, the property to have belonged to both husband and wife; and that the evidence and judgment do not correspond with that allegation.

The position of the plaintiffs' counsel, that the husband's approbation is necessary to render valid an alienation of the wife's paraphernal effects, is correct, and fully supported

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by the authority relied on. The evidence, we think, brings the case within the law. The witnesses state, the cattle to belong to Mrs. Langlini, and that she used her deceased husband's mark. The testimony, on the part of the defendant, does not establish that the children by the first marriage, and their mother, held any property in common.

In regard to the variance between the allegations in the petition, and the proof given, we are of opinion, that this objection should have been made when the evidence was offered in the court below—*Flogny* vs. *Adams*, 11 *Martin*, 549. As it was not taken there, and the parties proceeded to investigate their rights with reference to the true capacity in which the plaintiff, who obtained judgment, should have stated her claim, the exception cannot be listened to at this stage of the proceedings—*Canfield* vs. *M. Laughlin*, 9 *Martin*, 303—*Bryan & Wife* vs. *Moore's heirs*, *ibid.* 26. *Larche* vs. *Jackson*, *ibid.* 284.

The counsel for the defendant endeavoured to distinguish this case from those cited, by showing, that here there were two plaintiffs, and judgment was only given in favour of one of them: in those already decided, it

was merely a different right from that alleged, established in the same person. We do not perceive that this circumstance makes any essential difference. It is every day's practice, that judgment is given in favour of one of several plaintiffs, and against the others if they fail in the proof necessary to support their case. In the present instance, as the husband was obligated to assist his wife in the prosecution of her claim, it was unnecessary to enter judgment of nonsuit against him, for his appearance was good for that purpose, though he was not able to establish a right in himself.

On the whole, we are all satisfied that the law authorizes, what the justice of the case requires, that the judgment of the district court be affirmed with costs.

Brent for plaintiffs, *Brownson* for defendant.

PORTER vs. *DUGAT.*

APPEAL from the court of the fifth district.

The time of the meeting of arbitrators may be shown by parole evidence. Although all the arbitrators must be present.

MATHEWS, J. delivered the opinion of the court. In this case the parties having submitted, by a written argument of compromise,

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when the award is given, their unanimity is not required by any law.

all matters in dispute between them arising out of the pleadings in the case, to the arbitration and final decision of certain persons, three in number, as named in the act of submission, and they having made their award and judgment in pursuance of the powers granted to them and returned the same to the district court, to be homologated and rendered executory; the plaintiff, by his counsel, excepted to said award, and assigned as reasons against its validity the following:—

1. That by the submission, the arbitrators were to meet and organize themselves to act on the third Monday in January, 1822, at the court-house in St. Martinsville; and by the award rendered, it appears that the said meeting and award was held and made on the 4th of February, 1822.

2. That it does not appear, that said award was given in presence of all the arbitrators, and that all the arbitrators gave judgment together.

3. That by said submission all of the arbitrators ought to have concurred in opinion, and that the award of two is not binding on the plaintiff, &c.

The district court overruled these objec-

tions to the award, confirmed and adopted it as the judgment of said court, &c., from which judgment the plaintiff appealed.

In the course of the trial in the court below, parole evidence was offered to show, that the arbitrators did meet on the day as directed in the act of submission; which being received, the plaintiff excepted to the opinion of the court by which it was admitted, on the ground of being contrary to written evidence, viz. the award and submission; the latter having pointed out the third Monday of January for the meeting of the arbitrators, and the former showing that they did not meet until the 4th of February following.

To come to a just conclusion on this bill of exceptions, it is necessary to ascertain whether or not arbitrators are bound to keep a record of all their proceedings, of every step taken by them in a cause previous to final award and judgment? We know of no law that requires such strictness of proceeding before judges appointed by the will of parties litigant, to settle their disputes and differences: and if arbitrators are not bound to keep a detailed written account of their meetings, adjournments, and all other proceedings

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in a cause up to the final judgment, it is believed that no good reason exists for the rejection of proof of these circumstances by parole, whenever the situation of a suit requires it. We are therefore of opinion, that the district court was correct in admitting the testimony offered in the present case. It appears by this testimony, that not only the arbitrators met on the appointed day, but that the parties themselves were present, and on the same day substituted Muggah as an arbitrator in the place of Eastin, who was stated to be sick, as is shown by an additional article to the act of submission signed by said parties. The time limited within which the arbitrators were to have given their award and judgment, seems from the expressions in the submission, to have been the period of the meeting of the district court, subsequently holden for the parish of St. Martins; with this requisition they have complied, and on the ground of the time in which the award was made, all objections cease.

As to the second ground of objection, it is true that where "several arbitrators are named by the compromise, they cannot give their award unless they all see the proceeding and

give judgment on it together; but it is not necessary that the award be signed by them all. *Code* 444, *art.* 29.

From the manner in which this provision of the *Code* is worded, it does not appear to us to have materially altered former laws on the subject of arbitration; no new principle is introduced, requiring unanimity amongst arbitrators, in order to render valid their decision. It suffices, that a majority concur, provided that all be present at the time of making their award. The fact that all were thus present, in the case now under consideration, is clearly established by testimony, to which no exception was taken, and to which, it is believed, that none could have been legally supported.

The reason of the law which requires the presence of all when a case is submitted to more than one arbitrator, is clear and sound, viz. that the arguments of the dissenting arbitrator might have produced a change in their award and judgment.

The view which we have taken of the two first exceptions to the award in the present case, containing in our opinion an answer and

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refutation to the third, it is considered useless to further notice it.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Brent for plaintiff, *Brownson* for defendant.

PORTER, J. did not join in this opinion, having been of counsel in the cause.

THOMPSON vs. *CHRETIEN* & *AL.*

A judgment may be signed, after the expiration of three days, since it was pronounced.

The sheriff's return on an execution, need not state, that no personal property was to be found, to justify the seizure of slaves.

A creditor of the vendee may seize on a *fi. fa.* property sold by the latter, without any delivery

Costs may be given, without having been prayed for, or a prayer for general relief.

APPEAL from the court of the fifth district.

MARTIN, J. delivered the opinion of the court. The plaintiff claims two negroes in the possession of the defendants. He obtained judgment, and they appealed.

Both parties admit the slaves to have been the property of John Thompson, and claim them under him.

The plaintiff shows, that on the 20th of Jan. 1816, Bell obtained a judgment against John Thompson, which was recorded in the office of the parish judge on the 14th of February following; and on the 5th of January, 1821, an execution issued, and was afterwards levied on the two slaves, who are the subjects of the present suit. They were purchased by

Bell at the sheriff's sale, and from Bell by the present plaintiff, on the 11th of May following.

John Thompson deposed, he remained in possession of these two slaves till they were seized on the above execution. The present plaintiff having brought slaves to sell into this state, he ordinarily leaves them with the witness, and permits him to work them. When he left the state last summer, he forbid the negroes being sold till his return, and told the witness, he might have them for what they cost.

Scott deposed, both the defendants told him they took possession of the negroes about the 21st of July, 1821. They sent him for them to John Thompson, who had them in possession and delivered them. He believes this was on the aforesaid day.

It was admitted that the plaintiff paid Bell the consideration money, as stated in the bill of sale, and that the slaves are in the possession of the defendants.

They claim these slaves under an instrument of writing, which they contend is a bill of sale, and which bears date of the 20th of October, 1820.

The counsel for the defendant urges, that

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the judgment appealed from is void, because it was not *signed* on the third day after it was pronounced, but several days after. 2 *Mart. Digest*, 164.

We are of opinion, that the object of the legislature, in the section quoted, was to afford to the party against whom a judgment is pronounced, a delay of three days, to state his objections thereto; and for this purpose, prohibited the judge to give effect to it by his signature, till the expiration of that delay. It did not intend to require the judge's signature on that day.

It is further urged, that the sheriff's return on the execution ought to have shown that no personal property was found; otherwise the presumption is, that personal property existed, and the seizure of slaves was illegal. *Martin's Digest, Loco citato.*

We know not any law, requiring that the sheriff's return should state this circumstance. The direction to that officer to seize personal property before slaves is, no doubt, intended for the benefit of the debtor; that species of property being more generally divisible and saleable. We do not mean, however, to say, that as the disposal of real property is often

attended with considerable delay, the plaintiff may not insist also to have the benefit of the law in this respect; but, when neither he nor the defendants complain, we are clear in the opinion, that the objection cannot be made by any other person.

Bell acquired John Thompson's title to the slaves, by the seizure and sale made by the sheriff, under the execution,—*Civil Code*, 490, *art.* 1, and he conveyed them to the present plaintiff, by a notarial act, in which they are stated to have been *sold and delivered.*

The only question seems then to be: Had John Thompson the property of these slaves, at the time of the seizure? The defendants contend he had not, having transferred it to them. They offer no evidence of this, except in the document, which they call a bill of sale, and the plaintiff a mortgage.

As this case may be disposed of, without fixing the character of this instrument, by considering it in the light in which the defendants place it before us, we will do so.

A sale of these slaves gave the defendants the right of demanding the tradition or delivery of them. This delivery, alone, would vest the property in the defendants. This has

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been frequently determined in this court: for the first time, in the case of *Durnford* vs. *Brooke's Syndics*, 3 *Martin*, 222, 264: and since, in those of *Norris* vs. *Munford*, 4 *id.* 20. *Ramsey* vs. *Stephenson*, 5 *id.* 23. *Fiske* vs. *Chandler*, *id.* 24, and *Randal* vs. *Moore*, 9 *id.* 403.

It appears that, after the alleged sale, the defendants permitted the slaves to remain in the possession of John Thompson, till they were seized by the sheriff to satisfy a judgment obtained against him by one of his creditors.

No actual delivery took place; the deed does not state that the slaves were delivered, nor were they in the possession of the defendants before. *Civil Code*, 350, *art.* 28.

It is impossible to distinguish this case from that of *Pierce* vs. *Curtis & al.* 6 *Martin*, 418. See also that of *Copelly* vs. *Duverge*, 11 *Martin*, 674.

Lastly, the defendant says, that the district judge erred in allowing costs, as they were not prayed for in the petition. We are of opinion, that they may be given on a prayer for general relief, admitting that a demand of them be necessary.

It is therefore ordered, adjudged and de-

creed, that the judgment be affirmed with costs.

Brownson for the plaintiff, *Cuvillier* for the defendants.

KNOX vs. *HASLETT, CURATOR, &c.*

APPEAL from the court of the fifth district.

The party holding the affirmative, is bound to clearly establish his case.

PORTER, J. delivered the opinion of the court. The petitioner claims $729\frac{92}{100}$, due him by one Samuel M'Intire, deceased, of whose estate the defendant is curator; and he avers that $550 of this sum was secured to him by mortgage.

The defendant pleaded the general issue; insanity in M'Intire; and that, at the time he executed the act of mortgage, a petition for his interdiction, provoked by the plaintiff in this suit, was pending before the parish court.

The pendency of an action, to establish the fact of insanity, although not acted on by the judge before the death of M'Intire, authorized the introduction of testimony to prove that, at the time he executed the instrument, he was notoriously insane, *Civil Code*, 80, *art.* 16. The only question, therefore, which the cause

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presents, that offers the least difficulty, is one of fact—whether the testimony produced supports the plea of insanity?

The evidence which comes up with the record is in substance as follows:—

Bell swore, that at the time M'Intire executed the act, he was committing a great many extravagant acts which indicated that he was of an unsound state of mind; that the petition for interdiction was made out at the time deceased returned from the sea shore; that he never was sufficiently recovered, from that period until the time of his death, to be able to go abroad as usual; he appeared always deranged; sometimes so much so, as to leave his room and go naked to the house of plaintiff; at other times, he would talk as reasonably as he ever did; there were times when a stranger would have thought him in his right mind, but one whose suspicions were awakened would have thought otherwise; deceased always kept a quantity of liquors in his room.

Kirkby stated, that after M'Intire's return from the borders of the sea, he proposed to witness to purchase a house and that they agreed on the price, &c.; but observing a wildness in his looks, and that he talked about

a block. or some trifling object, in comparison with that which formed the object of their bargain, witness was induced to believe his mind deranged, and on that account declined the contract. A day or two after, the deceased ran out into the street naked, apparently insensible of what he was doing; could not say. if the deceased's conduct arose from drinking or other causes.

King testified, that he saw the deceased the day he returned home; at first he spoke rationally, but in a few minutes burst into tears, and appeared entirely deranged: saw him at intervals of four or five days or a week; at every interview he would, during some part of the conversation, appear bewildered; did not observe the state of deceased's mind at the time he came before him, as parish judge, to acknowledge the mortgage; thinks it possible he might have had lucid intervals.

Ray deposed, that he saw the deceased two or three times after he came from the seashore; for a minute or two he would talk quite rationally, and then appear deranged.

The fact of M'Intire having boarded with the plaintiff, and that the latter was in the

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daily habit of visiting him during the period, spoken of by the witnesses, was established.

The defendant also introduced the petition of the plaintiff, addressed to the parish judge, dated the 25th November, 1818, wherein it is stated, that M'Intire is subject to "an habitual state of mental derangement, and totally incompetent to the management of his affairs."

On the part of the plaintiff, the following evidence was taken:—

Todd declared, that he did not see M'Intire for seven or eight days after his return from the sea-shore; that he could discover no marks of insanity in him, though it had been reported he was insane. Deceased appeared dejected, and in deep melancholy, which witness attributed to the deranged state of his affairs, and his bodily weakness. Thinks if an unjust claim had been presented, he would have discovered it. Witness was spoken to by plaintiff, if he knew of any manner in which his claim against M'Intire could be secured? he replied, he believed all his property, except some land in Concordia, was incumbered. Deceased showed great repugnance to execute the act of mortgage; consented to it finally through the solicitation of witness; ob-

served no symptoms of his being deranged at the time he signed the instrument.

Irwin swore, that he purchased property from M'Intire after his return; appeared to witness perfectly in his right mind; believes he drank freely, but not so as to be intoxicated. Kirkby's contract for the house was twelve or fifteen days after the deponent had bought property from the deceased; and witness told Kirkby, he did not then think deceased in a situation to make a bargain.

Doctor Dixon stated, that he attended deceased in his last illness, but did not know him particularly until about twenty days before his death; found him sometimes quite rational, at others not so, but insane; thinks he was sometimes competent to do business, and at other times not; deceased was in the habit of drinking freely; witness attributed his insanity to his weak state of body, and the deranged state of his affairs; thinks drinking also contributed to it.

Wartel deposed, that when M'Intire returned, he had a wild appearance; but that witness paid him a sum of money afterwards, believing him capable of doing business; paid the money without calling witnesses.

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Thomson said he saw deceased after he reached home from his trip to the sea-shore, saw him frequently, was in the habit of visiting him as an acquaintance; he conversed rationally.

Simonds testified, that he lived in the same house with deceased during his last illness, saw him almost every day, never observed in him any marks of insanity, until he made the sale to Kirkby.

Bell called a second time, deposed, that the petition to have the deceased interdicted was abandoned. Why? he did not know.

Smoot swore, that he saw deceased after his return from the sea-shore, did not observe him to be insane, though worse than he went away.

On this proof, the district court gave judgment for the plaintiff. and we cannot say that it erred. The testimony, which is principally oral, is somewhat contradictory; and when it is so, the tribunal of the first instance, from the mode investigation is conducted before it, possesses so many advantages over this in the discovery of truth, that it is now settled, its decision, on a question of fact, will prevail in the supreme court, if not manifestly erroneous. *Rachel* vs. *St. Amand*, 8 *Martin*. 363. *Brown* vs. *Louisiana Bank*, *ibid.* 393. We apply this doc-

trine, with entire readiness, to the case before us; for the evidence renders the fact of insanity doubtful, and the decision of the judge below, against the party holding the affirmative, was in perfect conformity with that principle, which requires him, who avers, not to raise doubts, but to establish facts.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Brownson for plaintiff, *Brent*, *Lessassier* and *King*, for defendant.

MOORE'S ASSIGNEE vs. *KING* & *AL.*

APPEAL from the court of the fifth district.

The vendor's ignorance of a defect in the slave, does not protect him in the action *quanti minoris.*

If the vendee, in such a case, being sued for the price, answer that he is entitled to relief, and prays that the vendor may say, on oath, whether the defect complained of did not exist at the time of the

MARTIN, J. delivered the opinion of the court.* The plaintiff sues on an obligation of the defendants, assigned him by King.

The principal, in the obligation, pleaded it was not a negotiable one, denied having had notice of the assignment, and averred he had an equitable defence. He prayed, that the

*PORTER, J. did not join in the opinion, having been of counsel in the cause.

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assignor might be made a party to the suit, and compelled to answer, on oath, whether the sum mentioned in the obligation was not the price of a negro woman sold by the assignor to him? Whether the woman had not before, and at the time of the sale, a pendulous wen, on the inside of one of her thighs, which, at times, prevented her rendering any service at all; and whether this circumstance was disclosed at the time of the sale?

sale, and makes no offer to return the slave; this, at least on the appeal, will be held sufficient notice of the defence, without an averment of the existence of the defect, and a prayer for a rescission of the sale, or diminution of the price.

The assignor admitted, that she received the defendants' obligation as the price of a negro woman sold him, and assigned it to the plaintiff:—that the woman had, at the time of the sale, a mark on the inside of one of her thighs, which did not injure her, nor prevent her services at any time while she was owned by her; hence this circumstance was not disclosed to the vendee:—that she did not know of any pendulous wen, as stated in the answer; but only of the aforesaid mark, which, however, she never examined.

The jury found that the sum mentioned in the obligation was the price of the negro woman named in the answer, who had a pendulous wen, as there stated; which rendered her, at times, incapable of labour; a circumstance

which was not disclosed at or previous to the sale, and that, consequently, the plaintiff ought to suffer a diminution of $150 from the price.

The plaintiff had judgment accordingly, and appealed.

Dr. Elmor deposed, that about eighteen months after the sale he examined the woman, and found she had a pendulous wen, of the size of a duck's egg, attached by a short neck to the inside of her thigh, near the left *labia pudenda*. It was said, she was laid up in consequence of an injury the wen had received while she was crossing a fence. It was wounded and ulcerated; she was relieved. He thinks the wen must have been of ancient origin, as wens do not reach the size of this in less than one or two years. The woman must have had it from her infancy. From its appearance, when the witness saw it, it must have laid up the woman from eight to ten days, and the expense of her cure could not exceed ten dollars. It must ever be subject to injury, and must incommode her in walking. The witness thinks it ought to be amputated, which would not be attended with danger, would confine her for fifteen or twenty days, and would cost about thirty dollars. Were

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not the witness a surgeon, he would not have given half of the price for her, on account of the wen; and as a surgeon, he thinks, he would estimate the diminution in the price, occasioned by it, at one hundred dollars.

Dr. Dixon, having heard Dr. Elmor give his evidence, deposed, his opinion was perfectly the same; except that, as an individual, he would think the diminution of the value of the slave, occasioned by the existence of the wen, at two hundred dollars.

Marshal, the defendant's overseer, deposed, the slave was smart and active. She was sick once or twice with the fever. He never discovered that she limped.

The plaintiff's counsel contends, that as it is not proved that the vendor had any knowlege of the existence of the wen, no diminution of the price ought to have been made.—*Civ. Code*, 360, *art.* 80.

The ignorance of the vendor protects him, indeed, against the redhibitory action; but it is that action, alone, of which the *Code* speaks, in the part quoted.

This ignorance will not avail in the action, *quanti minoris*. "If the seller was ignorant of the defect, then the buyer must keep the slave, and the seller restore so much of the price, as

the value is diminished by reason of the defect; and so we say, if the slave was affected with any hidden disease. *Part.* 5, 3, 64.

We do not think that there is any weight in the objection, that the answer does not expressly aver the existence of the wen, nor conclude with a prayer for the rescission of the sale, or a diminution of the price. The defendant expressly asserts, he is entitled to relief; and prays that the assignor may say, on oath, whether the slave was not afflicted with a wen, which rendered her services much less valuable. This, in our opinion, sufficed to give notice to the plaintiff, of the nature of the defence.

The defendant being sued for the price, and making no offer of returning the slave, the inference was obvious, that he expected a reduction of the price. Admitting, however, that the plaintiff might have taken advantage, at first, of the insufficiency of the answer, it is certainly too late on the appeal.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Brownson and *Lessassier* for the plaintiff, *Brent* and *King* for the defendants.

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FUSILIER vs. *HENNEN.*

APPEAL from the court of the fifth district.

Whether the lessor of a defendant, who disclaims, may be brought in, when he is not domiciliated in the parish? *Quere.*

Brownson, for the plaintiff. This suit was brought to recover a narrow strip of land, lying in the parish of St. Mary, consisting of about one arpent front. Dr. James Hennen, who was living on the land at the time the suit was brought, was originally sued. He disclaimed title; stated in his answer, that the land belonged to A. Hennen, of New-Orleans, and that he was in possession as his tenant. The district court ordered, that A. Hennen should be cited in to defend the title, which was done.

A. Hennen appeared in obedience to the citation, and, among other pleas, put in one to the jurisdiction of the district court, alleging that he habitually resided in New-Orleans, and that he could not be sued in the parish of St. Mary. The jurisdiction of the district court was, however, sustained, and in this the defendant contends there is error, which this court ought to correct.

This question is one of considerable importance, and deserves a more careful examination than perhaps I shall be able to give it.

In many, if not all countries, actions have been divided into local and transitory, and it appears to be a matter which concerns, in some measure, the public policy of nations, to settle what injuries, sustained in one country, shall receive redress in others. Actions concerning lands have, so far as my information extends, been uniformly regarded in all countries as local. In England, actions, real or mixed, as trespasses, *quare clausum fregit*, ejectment, waste, &c. must be laid in the very county in which the lands lie. *Bac. Ab. Actions local and transitory.*

We all know the fate of Mr. Livingston's suit against Mr. Jefferson, brought in Virginia, to recover damages for being dispossessed of the Batture. This suit too, it will be recollected, was brought in the circuit court of the United States. It was instituted within a particular district of that general jurisdiction, which includes within its limits the land on which the trespass was alleged to have been committed—and yet the court would not entertain jurisdiction. I might ask, whether a suit was ever brought in any court, in this or any other country, to recover possession of lands located beyond the jurisdiction of such

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court? Actions, to recover possession of lands, must be necessarily and essentially local. The judgment, when obtained, operates *in rem*—and how vain and nugatory would it be to bring suit in a court which could not carry into effect its own judgment.

But the present, it will be said, is a different case. It will be urged, that executions from our district courts run into all parts of the state; and, therefore, that a judgment rendered in New-Orleans, may as well be carried into effect in the parish of St. Mary, as if it had been rendered in that parish. This may in fact be true. There are, however, other considerations, which have contributed to make these actions local, besides that of carrying into effect the judgments rendered in them. If a jury should be demanded, the policy of the law has generally been to take the jury from the neighbourhood in which the lands lie. The witnesses usually reside there, and it is often necessary to exhibit, by means of a survey, taken under the orders of the court, the localities and relative position of the object in contestation. All this is done with ease and convenience in a court sitting in the neighbourhood, but become tedious and

expensive operations, when ordered and controlled by a distant tribunal. The testimony too, when the suit is brought in a parish different from that in which the lands lie, would have to be taken principally by deposition, which is much inferior to *viva voce* evidence, given in open court; more particularly on questions of contested limits.

It will probably be argued, that it is the person, and not the subject matter in dispute, which regulates the jurisdiction of the court. And the acts of 1814, will, no doubt, be cited; which provides, that no person, having a permanent residence, shall be sued, in any civil action, in any other parish but that in which he shall habitually reside. 2 *Martin's Dig.* 204, *n.* 22.

If this suit had been directed, in the first instance, against Alfred Hennen, it should doubtless have been commenced in the city of New-Orleans, where he resides, and not in the parish of St. Mary. But it is difficult to conceive a case, in which that could have been necessary. If the land had been vacant, the plaintiff would, no doubt, have gone quietly into possession, and no suit would have been necessary. But, as he found the land occu-

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pied, it was necessary to commence proceedings against him in possession. Suppose I admit, that it is the person, together with the place in which he resides, which regulates the jurisdiction of the court; I may then ask, what person? The defendant will probably tell me, that it is the person who claims to be the owner: but, I contend, that it is the person in possession. What is the injury complained of? It is the corporal possession and detention of the thing claimed. Who then is the immediate cause of the injury? Most certainly, the person in possession. And who but the author of this injury, ought the plaintiff to have attacked? If I find a person in possession of my property, to which I know he can have no right, am I to inquire what excuse he have to offer for withholding it from me? May I not attack him at once, and, through my legal remedy, compel him to relinquish that which belongs to me, and to which, I know, he can have no title? It will, perhaps, be said, that the possessor is often the innocent agent of another. But that is an affair between him and his principal, and we should be sure, when we consent to act as agents for another, that we do so in a lawful cause. The posses-

sor must justify himself under the right of his principal; and if the principal had no right, it is clear he could communicate none.—*Nemo plus juris ad alium transferre potest quam ipse haberet.*

There is besides another reason, arising from necessity, for pursuing against the person in possession, and that is, that a judgment against any other person would not be *res-judicata* against him, and could not authorize an execution to dispossess him. This necessity equally exists, whether the object of the suit be real or personal property, and whether the possessor holds the thing in his own right or in the name of another. In this suit, the plaintiff chiefly claims possession, and, as subsidiary to that, damages for depriving him of that possession. By whom can possession be given? Certainly by no one but the actual occupant. Any other person would be obliged to get possession from him, before he could transfer it to others. By action then the plaintiff has demanded possession, the thing which was due; and this possession is claimed of the only person who could be condemned to give it. Before the possession of the plaintiff can begin, the detention of the

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previous possessor must be made to cease.—The judgment must necessarily have this double effect, or the remedy would be incomplete. Hence, the absolute necessity of bringing suit against the person in possession: and this course is not left to be inferred by reasoning from any vague phraseology in the law, but is pointed out in clear and explicit language. It is not directed once merely, but frequently. Thus—*In rem actio est, per quam rem nostram, quæ ab alio possidetur, petimus, et semper adversus eum est qui rem possidet. Dig. lib.* 44, *tit.* 7, *l.* 25.

In rem actio non contra venditorem, sed contra possidentem competit. Cod. lib. 3, *tit.* 19, *l.* 1.

It may be said that these laws contemplate the case of a person possessing in his own right, and are not applicable to those who possess in the name of another. The attention of the court is, therefore, particularly directed to the following law: *Si quis alterius nomine quolibet modo possidens immobilem rem litem ab aliquo per in rem actionem sustineat, &c.—Cod. lib.* 3, *tit.* 19, *l.* 2.

This law, of which the above is a part only, the court will perceive, on examining it, relates particularly to the case of those who

possess in the name of another, no matter by what title, and directs the procceeding, which, under such circumstances, must be had. It requires, the tenant in possession to make known to the court the name of the person in whose right he possesses. It orders, that the court shall grant a certain delay, in order that this person may be informed of the suit—and for what purpose? Why so that, whether he lives in the same city, whether in the country, or in another province, he may appear, by himself or attorney, to defend the suit in the place where the lands lie. It further states, that if, being thus cited, he does not appear within the time fixed by the court, prescription shall be deemed to be interrupted from the time of commencing the suit against the possessor. It proceeds to direct, that the court shall cite him, and if he still neglects to appear, that the plaintiff, after a summary examination, shall be put in possession. Here we find a plan of proceedings regularly marked out, and which embraces within its provisions precisely the case now before the court. It will be found too, on examining the law succeeding the one just cited, that, apparently suspecting some disposition to wander from

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these proceedings, it checks this propensity, and brings us back to them—*Actor rei forum sive in rem, sive in personam sit, actio sequitur, sed et in locis in quibus res propter quas contenditur, constitutæ sunt, jubemus in rem actionem adversus possidentem moveri.—Code, lib.* 3, *tit.* 19, *l.* 3.

The cautious precision of this last law is not a little remarkable. It begins by saying, that the plaintiff follows the tribunal of the defendant, whether the action be real or personal; and as if apprehensive that these general expressions might, by construction, be extended too far, it immediately imposed a limitation upon them. It commands, that real actions shall be brought, not only against the person in possession, but also in the place where the thing forming the object of the suit is situated; so that, even if it were possible to possess a thing in a place where it is not situated, a proposition which only requires to be stated to show its absurdity, still the suit must be brought in the place where it is situated. These laws have been adopted in Spain, and consequently form a part of the common law of this conntry. *Part.* 3, 2, 29. Are they repealed by the statute of 1814? It will not be pretended that there is any express repeal. The repeal

may, however, be implied, if the new law contains provisions "contrary to or irreconcileable with those of the former law." *Civil Code*, 5, *art.* 24. But, I shall be greatly in error if any thing "contrary to or irreconcileable with former laws," can be deduced from the statute of 1814. What is this statute but a confirmation of the *Roman Law*, which had said that the plaintiff follows the tribunal of the defendant? And where is the inconsistency between that and another rule, that in real actions the person in possession must be sued? I can see none, nor do I believe that the defendant can show any.

If the person really in possession must be sued, it is evident that the suit must be brought in the place where the lands lie; because, that is the place in which he possesses. But the gentleman may say, that he possesses constructively in New-Orleans. I answer to that, that the possession spoken of means a real and not a constructive one; because it is the real possession which creates the injury; and there can be no constructive possession by one person, without a real possession by another. It is true, the real possession of the tenant is the constructive possession of the landlord; and

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the law has, from an indulgent spirit, granted certain privileges to the latter, after the suit shall have been commenced against the former. But then it has left it optional with the landlord to avail himself of these privileges or not, as he may deem adviseable. The law will not permit him to lose even his constructive possession, which depends upon the real possession of his tenant, without giving him a fair opportunity for disputing the pretensions of him who seeks to deprive him of it. It therefore provides, that he shall be notified, and that reasonable time shall be allowed for him to appear and defend the suit. But this notice, which the law requires, cannot, it appears to me, be construed into a suit against the landlord. I consider it rather in the light of an extra privilege, accorded by the law on account of the interest he may have, to protect his own constructive possession, by maintaining the real possession of his tenant; a privilege, perhaps, indulged somewhat at the expense of rigorous justice on the part of him who brings the suit, but which is nevertheless wisely accorded to prevent greater injustice.

Let us suppose the proceeding changed, and that the suit, instead of being brought

against the tenant, had been brought against the landlord, in the first instance. Did the gentleman ever hear of a tenant being cited in to defend the title of his landlord? This would be to reverse the natural order of things. The right of the tenant is subordinate to that of the landlord. The latter, therefore, cannot be assisted by the former; for, if the landlord had no right, it is clear the tenant can have none to strengthen it with. The consequence of such a proceeding would therefore be, either that the tenant must be turned out of possession by the bare effect of the judgment against the landlord, and consequently without giving him any opportunity to contest the propriety of that judgment, or that another suit would be subsequently necessary against the tenant. The first alternative would produce great injustice towards the tenant. Perhaps, if an opportunity were allowed, he might deny that he occupied as tenant—he might pretend, and possibly prove, that he possessed in his own right—he might even be able to exhibit a legal title in himself. How could it be known with necessary certainty, except by bringing suit against him, in what character or capacity he held?

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The second alternative is attended with costs arising from multiplicity of actions, with unnecessary delay, besides many awkward incidental embarrassments, which could never grow out of the regular proceeding. I am certain that, unless the gentleman can show some pretty strong authority for his pretensions, the court cannot be disposed to adopt a proceeding which carries in its train such consequences.

Hennen, in propriâ personâ. The question presented for the consideration of the court is, that of jurisdiction. Was the defendant, Alfred Hennen, domiciliated in the parish of Orleans, liable to an action in the parish of St. Mary?

On the 27th August, 1817, the plaintiff filed a petition in the district court for the parish of St. Mary, against James Hennen, to recover the possession of a certain tract of land, situated in the last mentioned parish; of which he avers, that the said James Hennen is in possession, but of which he is the lawful owner. James Hennen disclaims any title to the tract of land; and avers, that he holds it only as the tenant of the present defendant,

Alfred Hennen; who thereon is served with a copy of the original petition, by order of the court; and against him only, all subsequent proceedings are conducted; the original defendant having been considered as no longer a party.

A plea to the jurisdiction of the court is made by the defendant, with other pleas and exceptions: also, a general denial is put in to the action, which is in conformity with the practice of our district courts, as established by the statute, (2 *Mart. Dig.* 154, *n.* 5,) and expounded by the decisions of this court. 4 *Mart.* 172, *Tricou* vs. *Bayon*, and *Mart.* 711, *Rippey* vs. *Dromgoole. Curia Philip. Excep. Dilat. Nos.* 7 & 8, 12 *Mart.* 100. For, to use the words of the court, "a defendant is bound to include, in the same answer, all his means of defence;" and from the passing of the statute, "it became the duty of defendants to file their allegations on the merits of the cause; and, at the same time, such exceptions as they wish to avail themselves of." 4 *Martin*, 172. The judge of the district court, however, considered this manner of answering as inadmissible, and as a renunciation of the plea to the jurisdiction: and admitting the

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fact, that the defendant was domiciliated in the parish of Orleans, overruled all his pleas and exceptions, and went on to a decision of the merits of the cause.

The legislature of 1814, *Acts*, *page* 74, (2 *Mart. Dig.* 204, *n.* 22,) had enacted that, "no person or persons, having a permanent residence, shall be sued in any civil action in any other parish but in that wherein he, she, or they shall habitually reside, any law to the contrary notwithstanding." This was nothing more than a recognition of the ancient law of the land. "*Actor rei forum, sive in rem, sive in personam sit actio, sequitur.*" *Code*, 3, 19, 3; 6 *Febrero*, 13. *n.* 33–36. *Part.* 3, 2, 32, & *Part.* 3, 3, 4. But the plaintiff's counsel, admitting the authority of this law, wishes to bring the defendant within the case provided by the *Acts of* 1817, *page* 28, § 6. Unfortunately, however, for his argument, there is but one defendant interested in the present suit; for but one makes claim to the land re-vindicated, and he resides habitually in the parish of Orleans. In vain, therefore, is this section invoked, for it can have no application to the pleadings of the cause; which, to make it applicable, should show, that two or more defendants

are intrusted in the land; and that one of them resides in the parish where the land is situated.

The plea then to the jurisdiction of the court, I consider as properly made, and as illegally overruled. The suit, therefore, should have been dismissed; and what the judge of the inferior court should have done, is now solicited from this honourable tribunal, that the defendant may have the full advantage of the laws which secured him from being sued out of his parish.

The wisdom, justice, and policy of the Roman maxim of jurisprudence, *actor rei sequitur forum*, has been perceived and admitted by legislators of almost every civilized country.

And where the defendant reserves his right of exceptions, though pleading to the merits, he might afterwards put in a plea to the jurisdiction of the court, (according to the *Spanish law, Curia Philip.* "*Excepciones Dilatorias*," *nos.* 7 & 8, & 12. *Martin*, 100.) Thereby, always securing the defendant against the jurisdiction of a judge, who by law has none.

But the plaintiff may urge, that he instituted his suit against the person holding possession of the land; as directed by the *Partidas*, 3, 2,

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29, extracted from the *Justinian Code*, 3, 19, 2. Had the plaintiff been ignorant of the owner of the land, or the person claiming it as such, his course would have been correct; in order that it might be declared on the record, whether the defendant sued was owner or not; and for no other purpose was the law established. The lessee of land, however, is not liable to any action; if sued, on naming his lessor, he is entitled to be dismissed, (*mis hors d'instance*;) and the party claiming the land, must proceed *de novo*, against the lessor. *Civ. Code*, 377, *art.* 25. (*Code Napoleon*, *n.* 1727—from which the 25*th art.* of the *Civil Code*, above cited, is literally copied.) *Pothier, Contrat de Louage, nos.* 90–91.—5 *Merlin, Répertoire de Jurisp.* 456, *verbo Garantie.*

Ce n'est pas contre un fermier ou locataire que procedent les actions des tiers qui prétendent le droit de propriété ou quelque autre droit dans l'heritage qui lui a été donné à ferme ou à loyer; mais contre le locateur de qui il les tient à loyer ou à ferme, et qui est le vrai possesseur de l'héritage: et si le locataire ou fermier est assigné par un tiers sur quelqu'une de ces actions, il n'est pas obligé de defendre ni par lui même, ni par un autre; il n'a pas même qualité pour le faire; il n'est obligé à autre chose qu'à

indiquer au demandeur la personne de qui il tient l'héritage à loyer ou à ferme ; et sur cette indication, il doit être renvoyé de la demande, et le demandeur renvoyé à se pourvoir contre cette personne. Pothier, Contrat de Louage. no. 91.

Quand un locataire ou fermier est appelé en justice par un tiers qui conclut contre lui à ce qu'il soit condamné à délaisser héritage dont il jouit, il suffit au locataire ou fermier d'indiquer à ce tiers le nom de son bailleur, afin qu'il se pourvoie contre lui. Jousse, sur l'article 1, tit. 8 de l'ordonnance de 1667.

Effectivement, Papon, liv. 11, tit. 4, n. 18, et Robert, rerum Judicaturum, liv. 4, chap. 9, rapportent deux arrêts du parlement de Paris, des 24 Septembre, 1563, et 26 Septembre, 1579, qui ont jugé qu'un fermier assigné en délaissement d'un héritage, qu'il occupe en vertu de son bail, doit obtenir congé de la demande en déclinant le nom de son bailleur, et qu'il n'est pas obligé de le mettre en cause.

Mais l'article 1727 du Code Napoleon ne déroge-t-il pas à notre jurisprudence ? Voici ses termes : (literally the same with the *Civil Code.*)

Ces derniers termes, et doit être mis hors de cause s'il l'exige, en nommant le bailleur, présentent, comme l'on voit, une disposition parfaitement conforme aux arrêts cités. Mais cette disposition n'est-

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elle pas contrariée par celle qui résulte des termes précédens, il doit appeler le bailleur en Garantie ?

Il faut convenir qu'à la première vue, ces deux dispositions paraissent s'éntre-détruire. Si le fermier doit être mis hors de cause, du moment qu'il nomme son bailleur, il ne peut pas être tenu d'appeler son bailleur en Garantie ; et s'il est tenu d'appeler son bailleur en Garantie, il ne lui suffit pas de nommer son bailleur pour être mis hors de cause. Il faut donc chercher un moyen de concilier ces deux dispositions ; car on ne peut pas supposer qu'une antinomie aussi palpable soit èchappée au législateur dans un même article ; et ce moyen se présente de lui même, en distinguant ce à quoi est tenu le fermier envers son bailleur, d'avec ce à quoi il est tenu envers le demandeur en délaissement.

Le demandeur en délaissement à qui le fermier a décliné le nom de son bailleur, pourrait-il, à défaut de mise en cause de celui-ci, obtenir un jugement contre celui-là ? Non certainement. Le jugement par lequel le fermier serait condamné au délaissement en l'absence du bailleur, serait sans effet contre le bailleur lui-même. Le fermier ne nuit donc pas au demandeur en délaissement, par le défaut de mise en cause du bailleur ; et dès qu'il ne lui nuit pas, il est bien évident que le demandeur en délaissement n'a point d'action contre lui de ce chef.

Conçoit-on d'ailleurs comment le demandeur en délaissement pourrait, en assignant le fermier, se soustraire à la règle générale qui l'oblige d'assigner le bailleur à personne ou à domicile? C'est donc envers le demandeur en délaissement que le fermier doit être mis hors de cause, s'il l'exige, en nommant le bailleur pour lequel il possède.

Mais si le fermier n'est tenu à l'egard du demandeur en délaissement, qu'à nommer son bailleur, il a un autre devoir à remplir envers son bailleur même: il doit lui dénoncer le trouble qu'il éprouve dans sa possession; il doit en prévenant toute surprise de la part du demandeur en délaissement, mettre son bailleur à portée de se defendre; et comme en cas d'éviction, son bailleur lui devra des dommages-intérêts, il doit l'appeler en Garantie.—5 *Merlin, Répertoire de Jurisprudence*, 456, *verbo Garantie*, *Paillet, Manuel de Droit*, 5*th ed. Code Nap. art.* 1727, quotes this extract from *Merlin* as the correct exposition of the article.—See *Pothier, Propriété, nos.* 297–298. *Pothier, Traité de l'Hypotheque*, 12*mo. ed.* 154, *chap.* 2, *sec.* 1, *art.* 1.

Even in cases of warranty on sales, where the object appears to be to entertain a suit against the warrantor, out of the jurisdiction of his domicil, the suit would be dismissed.—*Pothier, Procedure Civile, chap.* 2, *sec.* 6, *art.* 2, §3.

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So carefully does the law guard against every attempt to withdraw a defendant from the jurisdiction acquired by a domicil.

The *Partida*, 3, 2, 29, only provides for the case where the owner will not appear, and then grants the remedy of *asentamiento*; to make him answer, or contest the right of the plaintiff—See *Curia Philip. Contestacion, n.* 12. This law too must be considered as repealed by the article of the *Civil Code*, 377, *n.* 25.—See *Novissima Recop. lib.* 11, *t.* 5, and *Part.* 3. *tit.* 8.

By the Spanish practice it was not necessary to cite the lessee—*Curia Philip.* "*Citacion*," *n.* 7. If not necessary, a suit against him could not, and would not give jurisdiction against his lessor.

A suit against the lessee does not even serve to interrupt prescription in favor of the lessor. *Pothier*, "*Prescription*," *n.* 52. It will be interrupted only from the date of the new suit instituted against the lessor.—*ib.* So completely irregular and useless is it, to institute a suit against the lessee instead of the lessor, the real possessor of the estate.

The only authorities produced by the counsel for the plaintiff, in support of the jurisdic-

tion of the court, are drawn from the rescripts of Roman emperors, prescribing the rules of practice for the courts of justice in the different provinces of the empire. Now, the practice in those courts, can have no binding authority in the tribunals of Louisiana, when at variance with the statutes of her legislature. It is evident, from the authors on French jurisprudence which I have quoted, that the practice in the tribunals of France, is directly the reverse of that which was followed in those of Rome. The common law of France was introduced into Louisiana by the emigrants from that country, and remained in force until the country was taken possession of by Spain. Nothing opposed to the French law, has been shown from any author on the Spanish law; on the contrary, I have cited authorities to prove, that the jurisprudence of those two countries are in harmony. The statute of 1814 then, was only declaratory of the French and Spanish practice.

The distinction of local and transitory actions, is a creature of the *Common law*, and unknown in the *Roman civil law*. It is nugatory then for the plaintiff's counsel to found an argument on such distinction. Had Mr. Li-

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vingston, after having been dispossessed of his Batture by Mr. Jefferson, sued him for damages, in any country in Europe, governed by the civil law, he could have obtained a judgment, had there been no greater obstacle in his way than a plea to the jurisdiction of the court. So, should the plaintiff sue the defendant in the courts of his domicil, every redress which justice can yield, will easily be obtained, and carried into execution against him. The defendant is willing to meet the plaintiff there.

PORTER, J. declining to sit, on account of his having been of counsel in the cause, and MATHEWS, J. having some interest in the question, although both parties had entered on record their willingness to argue the case before him, from motives of delicacy, declined giving an opinion. The decision was postponed.